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.

FINANCIAL MARKETS ASSOCIATION

Dodd-Frank Implementation Update

Key Differences Between the CFTC and SEC Final Business Conduct Standards and Related Cross-Border Requirements

By Paul M. Architzel, Dan M. Berkovitz, Gail C. Bernstein, Seth Davis and Ted Serafini

The Securities and Exchange Commission (SEC) recently adopted final business conduct rules for security-based swap dealers (SBSDs) and major security-based swap participants (MSBSPs) under Section 15F(h) of the Securities Exchange Act (Exchange Act). The Commodity Futures Trading Commission (CFTC) adopted parallel rules for swap dealers (SDs) and major swap participants (MSPs) under Section 4s(h) of the Commodity Exchange Act (CEA) in 2012. Although the SEC and CFTC rules are similar in many important respects, they have several notable differences. This may complicate a firm's decision-making on whether to integrate its SBSD into its already registered SD. We have highlighted below some of the major differences between the SEC and CFTC rules.[1]

Structure of the Rules

The CFTC has divided the Section 4s(h) business conduct standards and requirements into internal business conduct standards (diligent supervision, position limits)[2] and external business conduct standards (antifraud, counterparty eligibility verification, disclosure of material information and daily mark, clearing disclosures, communications—fair dealing, suitability, advisor to Special Entities, counterparty to Special Entities, and political contributions). The SEC's rulemaking, by contrast, covers the external business conduct standards, diligent supervision and chief compliance officer (CCO). In addition, the SEC rules address their cross-border application. The exact compliance date for these rules has not yet been determined.[3]

Chief Compliance Officer (CFTC Rule 3.3 and SEC Rule 15Fk-1)

Duties. The SEC's CCO rules differ from those of the CFTC in several key respects. Most significantly, the SEC rules are "designed to be generally consistent with the current compliance obligations applicable to CCOs of other [SEC]-regulated entities," for example under FINRA Rule 3130. They thus frame the role of a CCO as that of an advisor whose job is to take "reasonable steps to ensure" that the SBSD implements an appropriate compliance program. The adopting release confirms the SEC's view that "it is the responsibility of the [SBSD], not the CCO in his or her personal capacity, to establish and enforce required policies and procedures," and explicitly recognizes that "the title of CCO does not, in and of itself, carry supervisory responsibilities, and a CCO does not become a

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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 address various updates from the banking regulators, the CFTC and the CFPB and look and the most recent developments with regard to BSA/AML.

BANKING REGULATORS

Federal Banking Agencies Issue Recommendations as Part of the Section 620 Report

On September 8, 2016, the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), and the Office of the Comptroller of the Currency (the "OCC") issued their report pursuant to Section 620 (the "Section 620 Report") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). In accordance with Section 620 of the Dodd-Frank Act, these agencies are required to conduct a study of the activities and investments that banking entities may engage in under state and federal law and provide recommendations regarding: (i) the negative effect of such activities on the safety and soundness of the U.S. financial system; (ii) the appropriateness of the conduct of such activities; and (iii) additional restrictions on such activities. The following recommendations were made in the Section 620 Report:

Federal Reserve Recommendations. In the Section 620 Report, the Federal Reserve made four recommendations, which, if implemented, would require Congressional action. First, the Federal Reserve recommended repealing the ability of financial holding companies ("FHCs") to engage in merchant banking activities. Second, the Federal Reserve recommended eliminating the grandfathered authority for certain FHCs to engage in commodities activities under Section 4(o) of the Bank Holding Company Act of 1956, as amended. Third, the Federal Reserve recommended the repeal of an exemption for the corporate owners of industrial loan companies to operate outside of the regulatory and supervisory framework applicable to other corporate owners of insured depository institutions. Fourth, the Federal Reserve recommended repealing the exemption for grandfathered unitary savings and loan holding companies from the activities restrictions applicable to other savings and loan holding companies.

FDIC Recommendations. The FDIC reviewed the activities in which state banks and state savings associations may be engaged and made two recommendations for changes to Part 362 of the FDIC's regulations, which applies to the activities of insured state banks and insured savings associations. In the Section 620 Report, the FDIC stated that it intends to review activities related to investments in other financial institutions and other equity investments to determine whether changes to Part 362 are needed in light of more recent regulatory and statutory rules governing such investments. The FDIC also stated that it plans to determine whether the prudential conditions and standards related to mineral rights, commodities, or other non-traditional activities need to be clarified and whether a statement of policy needs to be issued.

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'supervisor' solely because he or she has provided advice or counsel concerning compliance or legal issues to business line personnel, or assisted in the remediation of an issue. Consistent with current industry practice, the [SEC] generally would not expect a CCO appointed in accordance with Rule 15Fk-1 to have supervisory responsibilities outside of the compliance department." Therefore, "absent facts and circumstances that establish otherwise, the [SEC] generally would not expect that a CCO would be subject to a sanction by the Commission for failure to supervise other SBS Entity personnel."

Conversely, the CFTC rules appear to place more direct responsibility on the CCO for implementation. The SEC rules, for example, require the CCO to take "reasonable steps" to ensure the SBSD establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with applicable requirements, while the CFTC rules require the CCO to "tak[e] reasonable steps to ensure compliance," and to "establish" certain procedures in consultation with the SD's board of directors or senior officer. The SEC rule makes clear that in taking reasonable steps to ensure that the SBSD has an appropriate compliance program, the CCO must satisfy three specific obligations: he or she must (i) review the SBSD's compliance, i.e., prepare the SBSD's annual assessment of its policies and procedures; (ii) take reasonable steps to ensure that the SBSD has a system reasonably designed to remediate non-compliance issues identified by the CCO; and (iii) take reasonable steps to ensure that the SBSD establishes and follows procedures reasonably designed to address non-compliance issues. While the CFTC rules also require the SD to address non-compliance issues, the CCO must be directly involved in establishing the procedures.

"The SEC rules appear to be stricter than the CFTC rules with respect to compensation and removal of the CCO."

Another example of the narrower scope of the SEC rules is that they require the CCO to take reasonable steps (in consultation with the board or senior officer) to resolve conflicts, while the CFTC requires the CCO to resolve conflicts (in consultation with the board or senior officer). In addition, the SEC rules require the CCO's steps to be taken in connection with any "material" conflicts, while the CFTC rules require resolution of "any conflicts."

While both the CFTC and SEC rules require the CCO to "administer" the SD's or SBSD's policies and procedures, the CFTC rules frame this responsibility more broadly, requiring the CCO to administer the SD's policies and procedures "reasonably designed to ensure compliance with *the [Commodity Exchange Act (CEA)] and [CFTC] regulations*" (emphasis added). By contrast, the SEC rules limit the CCO's administration of policies and procedures to those "required to be established *pursuant to section 15F of the [Exchange] Act and the rules and regulations thereunder*" (emphasis added). Section 15F deals with registration and regulation of SBSDs, the securities-based swaps analog of Section 4s of the CEA.

The scope of the CCO's responsibilities and the potential for personal liability for the CCO thus appear to be significantly greater under the CFTC rules. Indeed, the CFTC observed in the release adopting the internal business conduct standards the role of the CCO "required under the CEA, as amended by the Dodd-Frank Act, goes beyond what has been represented by commenters as the customary and traditional role of a compliance officer."[4]

Compensation and Removal. The SEC rules appear to be stricter than the CFTC rules with respect to compensation and removal of the CCO. Under the SEC rules, only a majority of the board can set compensation for or remove the CCO, whereas the CFTC rules permit either the board or the senior officer to remove the CCO. However, in contrast to the CFTC rules, the SEC rules do not explicitly state who may appoint a CCO.

Annual Report. Although both sets of rules require the CCO to prepare and sign an annual report, and both share a common 90-day deadline,[5] the CFTC's annual report requirements are significantly more detailed. The CFTC requires the CCO to review each applicable requirement and identify the policy and procedure that is reasonably designed to ensure compliance. The SEC rules do not contain either of these requirements; rather, they require only a "description" of the policies and procedures in the annual report.

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Supervision (CFTC Rule 23.602 and SEC Rule 15Fh-3)

Both the SEC and the CFTC require SDs and SBSDs to diligently supervise their personnel. In its adopting release, the SEC has stated that the supervision requirements set forth in Rule 15Fh-3 are largely the same as the similar provision adopted by the CFTC. The SEC has, however, provided both greater detail with respect to the minimum requirements for adequate supervision as well as a safe harbor if certain conditions are met (e.g., the maintaining of written policies and procedures reasonably designed to prevent and detect violations of the federal securities laws).[6]

> *"Although similar in many ways, the new SEC rules regarding antifraud differ from their CFTC counterparts in one significant respect."*

External Business Conduct Standards

Antifraud (CFTC Rule 23.410 and SEC Rule 15Fh-4)

Although similar in many ways, the new SEC rules regarding antifraud differ from their CFTC counterparts in one significant respect. While the CFTC rules include an express affirmative defense for SDs that did not act intentionally or recklessly in connection with any antifraud violations and complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for any alleged violation, the SEC rules do not contain a similar affirmative defense. In comparing its approach to that of the CFTC, the SEC noted:

> The Commission is not adopting the commenter's recommendation that the final rules incorporate an affirmative "policies and procedures defense." We recognize that the CFTC adopted an express, affirmative defense in its parallel antifraud rules, in part in response to concerns that the statute may impose non-scienter liability for fraud in private rights of action.[ ] The Exchange Act, however, does not contain a parallel provision.[ ] Moreover, the Commission has considered the concerns raised by commenters and determined not to provide a similar safe harbor from liability for fraud on behalf of [SBS] … Entities. As discussed throughout the release in the context of specific rules, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections, and therefore we do not think it would be appropriate to provide the safe harbor requested by the commenter from liability for fraud. While we are not adopting a safe harbor from liability for fraud, as discussed below in connection with the relevant rules, the Commission has adopted rules that permit reasonable reliance on representations (e.g., Rule 15Fh-1(b)) and, where appropriate, allow SBS Entities to take into account the sophistication of the counterparty (e.g., Rule 15Fh-3(f) (regarding recommendations of security-based swaps or trading strategies)). (Footnotes omitted)

Confidential Treatment of Counterparty Information (CFTC Rule 23.410(c))

The CFTC rules make it unlawful for SDs to disclose or use for their own purposes in a way that would tend to be materially adverse to the interests of a counterparty any material confidential information provided to the SD by or on behalf of the counterparty. The SEC rules do not contain a similar prohibition. However, SBSDs are subject to Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which would make it unlawful, in connection with the purchase or sale of any security, to disclose or use material nonpublic information in violation of any duty owed by the SBSD, including to the counterparty that provided the information.

The SEC and CFTC appear to apply differing standards as to what constitutes material confidential information. The focus in the SEC context is on information that is material to the instrument (or issuer) involved in the transaction, whereas the focus in the CFTC context appears to be on the adverse impact on the counterparty. Thus, in the CFTC

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context, there could be situations where confidential information provided to the SD by a counterparty that would not generally be viewed as material by a reasonable investor would be considered material under CFTC Rule 23.410(c) if it were used by an SD in a way that tended to be materially adverse to the interests of the counterparty.

> *"The SEC and CFTC appear to apply differing standards as to what constitutes material confidential information."*

Safe-Harbor and Counterparty Eligibility (CFTC Rule 23.430 and SEC Rule 15Fh-1)

The SEC and CFTC rules both require SDs and SBSD, as applicable, to verify that the counterparty meets the necessary eligibility requirements before offering to enter into or entering into a swap or SBS. Both permit SDs and SBSDs to rely on written counterparty representations to satisfy the counterparty eligibility verification requirements.[7] Under both sets of rules, this requirement does not apply where the SD or SBSD does not know the counterparty's identity, but the scope of the carve-out differs somewhat.

Both the SEC and CFTC rules do not require eligibility verification where a swap or SBS is initiated on a designated contract market or registered securities exchange (since non-eligible contract participants are permitted to transact on DCMs and securities exchanges) or where a swap or SBS is initiated on a swap execution facility (SEF) or security-based SEF *and* the SD or SBSD does not know the counterparty's identity prior to execution. In addition, the SEC rules do not require eligibility verification whenever the identity of the counterparty is not known to the SBSD at a reasonably sufficient time prior to execution to permit the SBSD to comply with its obligations under the rules. For its part, the CFTC has provided more conditional no-action relief for the verification requirement in connection with certain "intended to be cleared" (ITBC) swaps.[8] Generally, the relief will apply when the SD does not know the counterparty's identity prior to execution but the transaction is cleared. It will also apply when the SD knows the identity of the counterparty prior to execution, as long as the ITBC swap is executed on or subject to the rules of a SEF or DCM and is either promptly cleared, not required to be cleared by the CFTC, or not accepted for clearing by a DCO.

The SEC expressly rejected this approach, arguing that where the identity of the counterparty is known, the counterparty should receive the benefits of the protections provided by the rules.

Disclosures (CFTC Rule 23.431 and SEC Rule 15Fh-3)

The SEC rules relating to required disclosures to counterparties generally mirror those of the CFTC with two important differences. First, the CFTC rules require that the counterparties agree in writing to the manner of disclosure, including as to whether pre-execution oral disclosure may be made, while the SEC rules do not require counterparty agreement to the method of disclosure. Second, the CFTC rules require that the SD provide a scenario analysis upon a counterparty's request and prior to entering into a transaction with a counterparty, while the SEC rules do not contain a similar requirement. According to the SEC, while a scenario analysis may "prove a valuable analytical tool," it is only "one means by which information may be conveyed"[9] and may not be appropriate or necessary in every situation to ensure the proper disclosures are made.

Daily Mark (CFTC Rule 23.431 and SEC Rule 15Fh-3)

The SEC rules relating to provision of the daily mark also differ from the CFTC rules in certain important respects. First, the SEC requires SBSDs to disclose their data sources and a description of the methodology and assumptions used to prepare the daily mark for uncleared swaps. By contrast, the CFTC rules do not require an SD to disclose information deemed confidential and proprietary that is utilized in preparation of the daily mark. The SEC noted that it does not foresee that these disclosures would involve confidential proprietary information. It thus remains to be seen whether this difference between the SEC's and CFTC's approaches will be material. In addition, the SEC rules require that the daily mark be provided free of charge and without any restrictions on internal use by the counterparty (although external use by the counterparty may be

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restricted). The CFTC rules do not appear to contain similar provisions.

Clearing Rights (CFTC Rule 23.432 and SEC Rule 15Fh-3)

Under the CFTC rules, where a swap is required to be cleared, the counterparty to the transaction has the sole right to elect where it will be cleared. The SEC rules, however, limit the counterparty to selecting from those clearing agencies with which the SBSD has a clearing relationship. Similarly, where the transaction is not required to be cleared and both sets of rules allow the counterparty to elect to clear and to choose the clearing agency, the SEC rules again limit the selection of clearing agencies to those with which the SBSD has a clearing relationship.

Advisor to Special Entities (CFTC Rule 23.440 and SEC Rule 240.15Fh-2)

Acts as an Advisor to a Special Entity. The SEC's definition of what it means to "act as an advisor" to a Special Entity is broader than the CFTC's definition. Under the CFTC rules, a swap dealer "acts as an advisor" to a Special Entity when it tailors its recommendation to the "particular needs or characteristics" of the Special Entity. The SEC declined to adopt the CFTC's more limited definition to "avoid unnecessarily narrowing the definition of recommendation." Thus, an SBSD acts as an advisor when it "recommends" an SBS or trading strategy. The SEC also declined to exclude from the definition of "recommendation" communications to groups of customers or investment managers with multiple clients.

Safe Harbor. Both the CFTC and SEC rules provide a safe harbor to SDs and SBSDs from being considered an advisor to an ERISA Special Entity. They also both provide a safe harbor with respect to all Special Entities. Though largely similar, to qualify for the safe harbor from acting as an advisor to *any* Special Entity, the SEC rules differ from the CFTC rules in four respects.

1. To qualify for the CFTC's safe harbor, an SD may not provide an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap. By contrast, the SEC declined to adopt this standard, arguing that it would lead to confusion.
2. Both sets of rules require the SD or SBSD to disclose to the Special Entity that the SD or SBSD is not undertaking to act in the Special Entity's best interests and also require the Special Entity to represent in writing that it will rely on advice from a qualified independent representative. The SEC rules also require the Special Entity to acknowledge in writing that the SBSD is not acting as an advisor, whereas the CFTC rules require the Special Entity to represent that the Special Entity will not rely on the SD's recommendations.
3. The SEC rules apply to any recommendation the Special Entity receives from the SBSD "involving" a SBS transaction, while the CFTC rules apply to recommendations "materially affecting" a swap transaction.
4. The SEC rules require an SBS transaction to be evaluated by a fiduciary before the transaction "is entered into," whereas the CFTC safe harbor requires a swap transaction to be evaluated by fiduciary before the transaction "occurs." With respect to this last point, the SEC noted that it expects the practical effect of these two terms to be the same.

Due Diligence. When acting as an advisor to a Special Entity, the SEC and CFTC rules have substantially similar requirements with respect to the type of

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information that an SBS or SD must make reasonable efforts to obtain to enable it to make a reasonable assessment that an SBS or trading strategy is in the Special Entity's best interest. The one exception to this is that the SEC also requires SBS to obtain from the Special Entity "the authority of the Special Entity to enter into a security-based swap." The CFTC rules do not include this requirement.

Acting as Counterparties to Special Entities (CFTC Rule 23.450 and SEC Rule 240.15Fh-5)

The CFTC and SEC rules are substantially the same with respect to the requirement that before acting as a counterparty to a Special Entity, the SD or SBSD have a "reasonable basis" to believe that the Special Entity has a qualified representative. Both SDs and SBSDs must also have a reasonable basis to believe that the independent representative makes appropriate and timely disclosures to the Special Entity. The SEC's disclosure requirement is narrower than the CFTC's in that the SEC rules only require disclosures of "material information concerning the security-based swap," while the CFTC rules do not contain the materiality qualifier.

"The SEC's definition of what it means to "act as an advisor" to a Special Entity is broader than the CFTC's definition."

The CFTC and SEC rules both have tests for determining whether a representative of a Special Entity is "independent" of the SD or SBSD. Both tests have elements focusing on the relationship of the representative to the SD or SBSD. The CFTC rules more narrowly focus on whether there is a "principal relationship" between the SD and the representative and whether the representative may be directly or indirectly controlled by the SD. The SEC rules, on the other hand, more broadly state that to be independent a representative may not have a relationship, "whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative."

The SEC and CFTC rules both require SDs and SBSDs to disclose to the Special Entity in writing the capacity in which they are acting and, if acting in more than one capacity with the Special Entity, the material differences between such capacities. The SEC rules, however, require SBSDs also to disclose "any other financial transaction or service involving the counterparty."

Finally, the CFTC rules require an SD's CCO to review any determination that there is not a reasonable basis to believe the representative of a Special Entity meets the criteria of the rule. The SEC does not have such a requirement.

Political Contributions (CFTC Rule 23.451 and SEC Rule 40.15Fh-6)

The rules addressing political contributions by SDs and SBSDs, although substantially the same, nevertheless contain slightly different terms. The CFTC rules address contributions to "governmental" Special Entities, while the SEC rules apply to "municipal entities." Nevertheless, the definitions of these terms are substantially identical.

Both rules also include an exception to the prohibition against entering into a transaction with a Special Entity to which the SD has made a contribution. The exception applies where the contribution is discovered by the SD or SBSD within 120 days and meets certain other requirements. The CFTC rules limit use of this exception to no more than two times per year, while the SEC somewhat more liberally allows a larger SBSD (i.e., one with over 50 covered associates) to rely on the exclusion up to three times a year.

Prime Brokerage Transactions, Allocation of Standards

Although the SEC acknowledged commenter concerns relating to the practical difficulty of complying with certain of the external business conduct standards in the context of prime brokerage relationships, it declined to allocate responsibilities between an executing dealer and the prime broker. The SEC recognized that the executing dealer may be in a better position to meet certain of the external business conduct requirements in some circumstances while the prime broker may be better positioned in other circumstances. The SEC also recognized that the CFTC, through no-action relief, has permitted swap dealers in prime brokerage arrangements to allocate these responsibilities

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between them,[10] but the SEC at the same time declined to adopt rules in this regard, stating that the request was beyond the scope of the rulemaking.

Cross-Border Activity (SEC Rule 3a71-3) and Substituted Compliance (SEC Rule 3a71-6)

The SEC has adopted several rules on cross-border SBS activities for market participants. These rules require non-US SBSDs that use personnel or agents located in the United States to "arrange, negotiate, or execute" an SBS transaction to count that transaction for purposes of determining whether it is required to register as an SBSD.[11] As part of the April 2016 business conduct standards rulemaking discussed in this alert, the SEC rules also extend the business conduct requirements to any SBS arranged, negotiated, or executed by a non-US SBSD through US personnel. Instead of adopting rules, the CFTC has issued interpretative guidance on how it will apply its SD rules in a cross-border context,[12] and has also requested comment on and provided time-limited no-action relief in connection with the applicability of SD requirements relating to swaps entered into by non-US SDs with non-US counterparties that are negotiated, arranged, or executed by personnel in the United States.[13]

> *"The rules addressing political contributions by SDs and SBSDs, although substantially the same, nevertheless contain slightly different terms."*

Although the process used by the two agencies has differed, both appear to apply their rules to cross-border transactions in a similar manner. In addition, although the CFTC has divided all SD requirements into either "Entity Level" or "Transaction Level" requirements and the SEC has focused on whether SBS transactions are "US business" or "foreign business," the impact of their approaches likely will largely be the same.

Under both approaches, the external business conduct requirements apply (without the availability of substituted compliance) when one or both counterparties to the transaction are US persons, except that they do not apply when the transaction is between a foreign branch of a US bank SD or SBSD and another foreign branch or a non-US person. The CCO and diligent supervision rules apply to both US and non-US SDs and SBSDs, but substituted compliance is available, upon a finding of comparability, for non-US SDs and SBSDs for all related requirements.[14] Under the SEC rules, substituted compliance will not be available for the antifraud provisions or requirements relating to disclosures and provision of information to regulators. Similarly, the CFTC has expressly retained its examination and enforcement authority in each of its comparability determinations.

Conclusion

The SEC stated in the adopting release its intent to harmonize its rules with the parallel CFTC requirements to create efficiencies for entities that have already established infrastructure to comply with the CFTC's SD regime. While the two sets of rules are largely similar, as we point out above, there are both significant and less substantial differences that dual registrants and those assessing how to structure their registered entities should consider. ■

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[1]Because there are so few MSPs and likely also to be few MSBSPs, we have focused on the rules as they relate to SDs and SBSDs.
[2]The CFTC's internal business conduct standards also address requirements under Section 4s(j) of the CEA.
[3]With one exception, the compliance date for the final SEC rules is the same as the compliance date for the final rules

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requiring SBSD and MSBSP registration. The compliance date for SBSD/MSBSP registration is the later of six months after the *Federal Register* publication of final margin and capital rules for uncleared security-based swaps (SBS), SBSD recordkeeping and reporting rules, or final rules establishing a process to apply to the SEC to allow associated persons subject to statutory disqualification to effect or be involved in effecting SBS. The exception to this general compliance date is that the compliance date for the new customer protection requirement in SEC Rule 3a71-3(c) for transactions classified as "US business" under the final rules will go into effect the later of 12 months after publication of these rules or the registration compliance date.

[4]Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128, 20162 (Apr. 3, 2012).

[5]Through no-action relief, the CFTC has extended the 60-day deadline in its rules to 90 days. No-Action Relief for Futures Commission Merchants, Swap Dealers, and Major Swap Participants from Compliance with the Timing Requirements of Commission Regulation 3.3(f)(2) Relating to Annual Reports by Chief Compliance Officers, CFTC Letter No. 15-15 (Mar. 27, 2015).

[6]CFTC caselaw interpreting CFTC Regulation 166.3 (diligent supervision by registrants) sets forth a similar framework. *See,* e.g., *CFTC v. Carnegie Trading Group, Ltd.,* 450 F.Supp.2d 788, 805 (N.D. Ohio, 2006) (finding that CFTC met its burden on its failure to supervise claim where defendant had failed to develop and install procedures for the detection and deterrence of wrongdoing by its agents).

[7]The SEC rules do not explicitly require that eligibility verification occur before offering or entering into a transaction. However, the adopting release makes clear the SEC's intent in this regard.

[8]CFTC No-action letter 13-70 defines an ITBC swap as a swap that is (i) of a type accepted for clearing by a DCO, and (ii) intended to be submitted for clearing contemporaneously with execution. The letter provides relief from the following CFTC Regulations: 17 C.F.R. §23.402(b)-(f) (KYC); § 23.430 (verification of counterparty eligibility); § 23.431(a) (disclosure, material risks, characteristics, incentives, mid-market mark); § 23.431(b) (scenario analysis); § 23.431(d)(1) (daily mark—cleared swaps); § 23.432 (right to clear and select DCO); § 23.434 (recommendations); § 23.440 (SD as Special Entity advisor); § 23.450 (SD as Special Entity counterparty); and § 23.451 (political contributions).

[9]*Id.*

[10]*See*, e.g., CFTC No-Action Letter 13-11 (Apr. 30, 2013).

[11]Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception, 81 Fed. Reg. 8598 (Feb. 19, 2016).

[12]Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45291 (Jul. 26, 2013).

[13]Request for Comment on Application of Commission Regulations to Swaps Between Non-US Swap Dealers and Non-US Counterparties Involving Personnel or Agents of the Non-US Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014); CFTC No-Action Letter No. 15-48 (Aug. 13, 2015).

[14]Under the CFTC's comparability determinations issued to date, substituted compliance has not been granted for the requirement that the CCO (or chief executive officer) of the SD certify and file with the CFTC the SD's annual compliance report, except that for Australia, substituted compliance also has not been granted for the requirement that the annual report be produced.

Directory

FMA will distribute the **2016 Membership Directory** next month. The Directory will include each member's full name, accreditation(s), title/department, mailing address (including floor/suite # or mail sort/code), phone number, cell number (if used for business), email and firm web site (if provided).

Supplementary sections will include a calendar of upcoming FMA events and a listing of various regulatory contacts. Members were emailed on August 22 and given a few weeks to correct their information on file and/or provide missing data. A "last chance" email went out on September 13 to non-responders with an extended deadline. If you missed this extension, there's still a limited window of opportunity—respond by the end of September by email (*dp-fma@starpower.net* – easiest!) or phone (202/544-6327). FMA wants your directory to be as accurate as possible...so be sure to submit your information right away.

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OCC Recommendations. In the Section 620 Report, the OCC recommended the following actions: clarify the minimum prudential standards for national banks engaged in certain swap dealing activities; review the risks that membership in certain clearinghouses poses to banking entities; consider whether copper should be subject to the same limits and reporting requirements that apply to other base metals; clarify limits on physical hedges; incorporate the Volcker Rule into the OCC's investment securities regulations; address concentrations of mark-to-model assets and liabilities; consider whether national banks should be prohibited from holding asset-backed securities as Type III securities; and consider prohibiting federal savings associations from holding asset-backed securities as corporate debt.

For our client alert on the Section 620 Report, please visit: *https://media2.mofo.com/documents/160908-federal-banking-section-620.pdf*. For a copy of the Section 620 Report itself, please visit: *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160908a1.pdf*.

Senators Ask Banking Regulators to Outline FinTech Oversight

On July 21, 2016, Senators Sherrod Brown (D-Ohio), ranking member of the Senate Banking Committee, and Jeff Merkley (D-Ore.), ranking member of the Subcommittee on Financial Institutions and Consumer Protection of the Senate Banking Committee, sent a letter to the heads of five federal agencies requesting that they outline the steps they are taking to "ensure effective oversight" of the FinTech market. The letter reveals the issues that the Senators, and the Senate Banking Committee, are focusing on with respect to FinTech.

The letter was sent to the Federal Reserve, the OCC, the FDIC, the National Credit Union Administration ("NCUA"), and the Consumer Financial Protection Bureau ("CFPB" and, together, the "Agencies"). In the letter, the Senators requested the Agencies' views on a number of FinTech issues.

Diverse Business Models. The Senators asked each of the Agencies what it has done to study and understand the various types of FinTech companies involved in marketplace lending, alternative payments, consumer lending, blockchain and distributed ledger, virtual currencies, personal finance management, robo-investing or saving, small business financing, merchant cash advances, education financing, crowdfunding, or invoice financing. In addition, the Senators inquired as to the role of each of the Agencies in supervising or regulating FinTech firms, including what considerations should be given to enabling non-bank companies to obtain a full or limited federal banking charter. The Senators also asked each of the Agencies to provide its views on the impact of FinTech firms on the institutions they regulate.

Regulation of Third-Party Service Providers. The Senators requested that each of the Agencies describe how its guidance related to third-party relationships applies to FinTech companies and what expectations they have for financial institutions that partner or otherwise engage with FinTech companies.

The Senators also asked each of the Agencies what factors they consider when determining whether and how to examine and regulate third-party service providers; steps each of the Agencies are taking to ensure that all financial institutions understand the risks and benefits of partnering with or acquiring FinTech companies and regulatory expectations for FinTech relationships with financial institutions; how often each of the Agencies has directly examined third-party service providers that are FinTech companies; and whether they have sufficient

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examination and enforcement authority over third-party service providers.

Consumer and Small Business Protections. The Senators requested that each of the Agencies describe the direct and indirect authority they have to supervise companies that make consumer and small business loans or advances and provide views on the use of alternative data to underwrite loans or advances and the ability of the agency to enforce consumer protection and fair lending laws and ensure that FinTech companies are Community Reinvestment Act compliant.

The Senators noted that concern has been raised about consumer rights to access information held by private companies and asked about plans to implement Dodd-Frank Act Section 1033. The Senators also requested that each of the Agencies address the Treasury Department's May 2016 assessment that small business loans under $100,000 share common characteristics with consumer loans but do not have the same consumer protections.

Coordination. Finally, the Senators asked each of the Agencies to provide information on coordination among Agencies and through interagency bodies, as well as international coordination. The Senators also asked each of the Agencies to comment on how they balance a culture of fostering innovation with their regulatory and supervisory responsibilities.

For our client alert on the letter, please visit: *https://media2.mofo.com/documents/160728fintechoversight.pdf*. For a copy of the letter, please visit: *http://www.brown.senate.gov/download/fintech-letter_-2016-07-21*.

Federal Reserve Officially Extends Volcker Rule Conformance Period with Respect to "Legacy Covered Funds" to July 21, 2017

The Federal Reserve, consistent with its previously announced intention, extended the conformance period with respect to investments in and relationships with covered funds and foreign funds subject to the provisions of Section 13 of the Bank Holding Company Act of 1956 (the "Volcker Rule") that were in place prior to December 31, 2013 ("legacy covered funds").

The Federal Reserve's July 7, 2016 order (the "Order"), extends until July 21, 2017, the deadline for banking entities to conform their investments in and relationships with legacy covered funds to the Volcker Rule's requirements. This is the last extension of the conformance period permitted by statute. The Order did not extend the conformance period for a banking entity's investments in or relationships with covered funds made on or after December 31, 2013, or to its proprietary trading activities. Such activities were required to come into conformance by July 21, 2015.

The Volcker Rule generally prohibits a banking entity from engaging in proprietary trading or from sponsoring or investing in private equity funds and hedge funds ("covered funds"), subject to a number of exemptions. In December 2013, the Federal Reserve, the OCC, the FDIC, the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC" and together, the "Agencies") issued a final rule (the "Final Rule") to implement the Volcker Rule.

The Volcker Rule became effective on July 21, 2012. The statute, however, allows banking entities two years, until July 21, 2014, to conform to the new requirements. The statute also provides the Federal Reserve with the authority to extend the conformance period for up to three one-year periods, one year at a time. Accordingly, at the same time the Agencies issued the Final Rule in December 2013, the Federal Reserve extended the conformance period for an additional year, until July 21, 2015.

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On December 18, 2014, the Federal Reserve granted a limited extension of the conformance period, until July 21, 2016, with respect to a banking entity's investments in and relationships with legacy covered funds (the "2014 Order"). In the 2014 Order, the Federal Reserve stated that it planned to extend the conformance period with respect to legacy covered funds for an additional year, the maximum extension permissible under the statute, to July 21, 2017. The Order announced on July 7, 2016, makes the extension official.

For our client alert on the extension of the conformance period, please visit: *https://media2.mofo.com/documents/160708volckerrule.pdf*. For a copy of the Order issued by the Federal Reserve, please visit: *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160707a1.pdf*.

Federal Reserve's Proposed Rules for Financial Contracts of Global Systemically Important Banking Organizations and ISDA's "Resolution Stay Jurisdictional Modular Protocol"

On May 11, 2016, the Federal Reserve issued proposed rules intended to reduce the potential risks posed to the U.S. financial system by too-big-to-fail banks, including rules requiring certain systemically important banks to include provisions in their contracts that would significantly limit their counterparties' default rights in over-the-counter swaps, repurchase and reverse repurchase agreements, securities lending and borrowing transactions, commodity contracts, and forward agreements. Subsequent to the Federal Reserve's proposal, the OCC issued proposed rules on August 19, 2016, substantively identical to the Board's proposed rules for entities that the OCC supervises. The proposed rules are intended to facilitate the orderly liquidation of systemically important financial institutions by ensuring the cross-border application of U.S. special resolution regimes to certain transactions with U.S. global systemically important banks (GSIB) and to facilitate the resolution of GSIBs under a "single point of entry" strategy. Contemporaneously with the Board's release of its proposed rules, the International Swaps and Derivatives Association, Inc. ("ISDA") released its ISDA Resolution Stay Jurisdictional Modular Protocol, intended to permit market participants to comply with the proposed rules (when adopted in their final form) and similar rules of foreign jurisdictions. For more information, please read our client alert *https://media2.mofo.com/documents/160629fedproposedrulesfinancialcontracts.pdf*

BSA/AML

New York State Proposes New Cybersecurity Regulation

On September 13, 2016, New York State Governor Andrew Cuomo announced a proposed regulation to establish certain cybersecurity-related requirements for financial institutions (the "Proposed Regulation"). If adopted, the Proposed Regulation would apply to all persons or entities authorized to operate (or required to be authorized to operate) under the New York Banking Law, the New York Insurance Law, or the New York Financial Services Law ("Covered Entities"). If adopted, the Proposed Regulation would be the first of its kind in the United States.

The Proposed Regulation would impose new reporting requirements on Covered Entities. Specifically, the board of directors or a senior officer of a Covered Entity would be required to annually certify (in the form provided in the Proposed Regulation) that the Covered Entity was in compliance with the regulation. Covered Entities would also be required to notify the Superintendent of Financial Services no later than 72 hours after becoming aware of a cybersecurity event.

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FMA Welcomes *More* New Members!

Kelley O'Mara	Davis Polk & Wardwell LLP
Jay Perlman	Navigant
Mark Pinocci	Citizens Bank
Steven Polansky	FINRA
Jai Ramaswamy	Bank of America
Cory Stefansson	BlackRock
Barbara Stettner	Allen & Overy LLP

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Further, the Proposed Regulation would require each Covered Entity to establish and maintain a cybersecurity program that performed the following core functions: (i) identify cyber risks; (ii) implement policies and procedures to prevent malicious acts; (iii) detect cybersecurity events; (iv) respond to cybersecurity events to mitigate any harm; (v) provide for the recovery from cybersecurity events and restoration of normal operations; and (vi) fulfill all regulatory reporting obligations. The cybersecurity program must also include penetration testing and vulnerability assessments and must implement and maintain an audit trail system.

The Proposed Regulation would also require a Covered Entity to adopt a written cybersecurity policy. The cybersecurity policy must be reviewed by the Covered Entity's board of directors (or its equivalent) and approved by a senior officer. Such policy must include, at a minimum, the following: information security; data governance and classification; access controls and identity management; business continuity and identity management; capacity and performance planning; systems operations and availability concerns; systems and network security; systems and network monitoring; systems and application development and quality assurance; physical security and environmental controls; customer data privacy; vendor and third-party service provider management; risk assessment; and incident response. Covered entities are also required to implement policies and procedures designed to ensure the security of information that is accessible to or held by third parties.

Under the Proposed Regulation, each Covered Entity would also be required to designate a qualified individual to serve as the Chief Information Security Officer ("CISO"). The CISO would be responsible for overseeing and implementing the cybersecurity program and enforcing the cybersecurity policy. This requirement may be met using a third-party service provider that is overseen by senior personnel of the Covered Entity. The CISO must submit a report to the board of directors (or its equivalent) at least bi-annually, that, among other things, identifies cyber risks and assesses the effectiveness of the cybersecurity program.

The Proposed Regulation also includes requirements regarding certain authentication procedures, data retention, training, encryption, and others. The Proposed Regulation would be effective January 1, 2017, with the first certification of compliance due January 15, 2018. Comments on the Proposed Regulation will be due 45 days after it is published in the New York State Register (which is anticipated to occur on September 28, 2016). For a copy of the Proposed Regulation, please visit: *http://www.dfs.ny.gov/legal/regulations/proposed/rp500t.pdf.*

FinCEN Issues Advisory to Financial Institutions on E-mail Compromise Fraud Schemes

On September 6, 2016, the Financial Crimes Enforcement Network ("FinCEN") issued an advisory to help financial institutions protect themselves against e-mail fraud schemes. Such fraud schemes involve attempts to misappropriate funds by tricking bank customers into effecting wire transfers.

There are two types of e-mail fraud schemes whereby criminals use the e-mail accounts of victims to send fraudulent payment instructions to financial institutions. The first type is called Business E-mail Compromise ("BEC") and occurs where a financial institution's commercial customers are targeted. The second type is called E-mail Account Compromise ("EAC") where a victim's personal accounts are targeted.

The advisory includes a list of red flags that financial institutions can use to detect BEC and EAC fraud. The red flags include the following:

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FMA Welcomes *More* New Members!

Kim Stock	FDIC
Patrick Vennetti	Atlas Energy Group, LLC
Mark Welshimer	Sullivan & Cromwell LLP
Julie Williams	Promontory Financial Group, LLC
Jeff Ziesman	Bryan Cave LLP

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- Transaction instructions contain different language, timing, and amounts than previously verified and authentic transaction instructions;
- Transaction instructions originate from an e-mail account that closely resembles a known customer's e-mail account but has been slightly altered;
- Transaction instructions direct payments to a known beneficiary but a different account for the beneficiary is used;
- Transaction instructions direct funds to a foreign bank account that has been documented in customer complaints as the destination for fraudulent transactions;
- Transaction instructions direct payment to a new beneficiary in an amount similar to, or in excess of, an amount the customer historically has paid to other beneficiaries;
- Transaction instructions are designated as "Urgent," "Secret," or "Confidential;"
- Transactions instructions are delivered in a way that gives the financial institution limited time or opportunity to confirm authenticity;
- Transaction instructions originate from a newly authorized person or from an authorized person who has not previously sent instructions;
- Transaction instructions are sent from a customer's employee based on information exclusively received via e-mail and unverified with executives, attorneys, or their designees who purportedly directed the employee;
- Additional payments are requested immediately following a successful payment to an account not previously used by the customer to pay its suppliers/vendors;
- A wire transfer is received for credit into an account but the wire transfer names a beneficiary that is not the account holder of record.

Institutions filing suspicious activity reports on BEC or EAC fraud should include wire transfer details as well as scheme details, such as the relevant e-mail addresses and associated IP addresses and a description and timing of the suspicious e-mails. Such suspicious activity reports should also reference the FinCEN advisory. The FinCEN advisory can be accessed here: *https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2016-a003.*

Treasury and the Federal Banking Agencies Issue Joint Fact Sheet on Correspondent Banking

On August 30, 2016, the U.S. Department of the Treasury and the Federal Banking Agencies (including the Federal Reserve, the FDIC, the NCUA, and the OCC) released a joint fact sheet summarizing key aspects of the federal supervisory and enforcement strategy and practices in the correspondent banking area.

U.S. depository institutions are expected to have robust Bank Secrecy Act ("BSA") and Office of Foreign Asset Control ("OFAC") compliance programs to ensure they understand the risk profiles of the foreign financial institutions ("FFIs") with which they have a correspondent banking relationship. Such programs should include a review of sufficient information to understand the types of customers served by the FFI and the markets in which the FFI is active. While there is no general requirement to conduct due diligence on the customers of the FFI, depository institutions should consider the types of information they need to adequately assess the risk posed by the correspondent banking relationship.

The fact sheet also discusses the Federal Banking Agencies' approach to the supervisory examination process, which is viewed as an integral part of the process of ensuring compliance with BSA and OFAC regulations. The Federal Banking Agencies take a risk-based approach to examination. The fact sheet notes that approximately 95% of all compliance deficiencies are handled through the supervisory process and do not include enforcement actions.

The fact sheet also discusses the enforcement action process as an extension of the supervisory role of the Federal Banking Agencies. Enforcement actions are used to address more serious deficiencies or are used where deficiencies are not addressed after they are brought to the institution's attention. In addition, cease-and-desist orders are required by statute where an institution does not establish or maintain a BSA compliance program or it fails to remediate problems with its program.

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The Federal Banking Agencies may also assess civil money penalties in limited circumstances to deter future violations or to emphasize the accountability of individuals. The fact sheet notes that the largest and most prominent money penalties in recent years involved a sustained pattern of serious violations and often involved criminal conduct that was separately prosecuted by the U.S. Department of Justice. Where a money penalty was assessed for sanctions violations, the matters generally involved intentional evasion or the failure of officers and senior management to respond to warning signs that their actions were illegal.

For a copy of the fact sheet, please visit: *https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf.*

FinCEN Proposes Rule to Remove AML Program Exemption for Banks Lacking a Federal Functional Regulator

On August 25, 2016, FinCEN published a proposed rule to eliminate the exemption for banks that lack a federal functional regulator from certain anti-money laundering ("AML") rules. FinCEN proposed the rule because it found that banks that lack a federal functional regulator are just as exposed to money laundering risks as banks with a federal functional regulator. The proposed rule seeks to eliminate this potential gap in the AML regulatory framework.

The new regulation will require any entity that meets the definition of a bank under 31 C.F.R. § 1010.100(d) to establish an AML program. This includes, among others, the following types of institutions: state-chartered non-depository trust companies; non-federally insured credit unions; private banks; non-federally insured state banks and savings associations; and international banking entities (banks authorized by Puerto Rico and the U.S. Virgin Islands to provide banking and other services to non-resident aliens).

Under the proposed rule, banks that lack a federal functional regulator will be required to establish an AML program that includes:

- A system of internal controls to assure ongoing compliance with the Bank Secrecy Act ("BSA") and the regulations promulgated thereunder;
- Independent testing for compliance;
- Designation of an individual or group of individuals responsible for coordinating and monitoring day-to-day compliance;
- Training for appropriate personnel; and
- Appropriate risk-based procedures for conducting ongoing customer due diligence.

The procedures for customer due diligence must include procedures for understanding the nature and purpose of a customer's relationships. Procedures should also be established for conducting ongoing monitoring to identify and report suspicious transactions.

The AML program must be approved by the board of directors of the bank, or its equivalent governing body.

FinCEN does not anticipate the burden of compliance to be significant because banks without a functional regulator are already required to comply with recordkeeping, reporting, and some customer identification program requirements under the BSA. For example, such banks currently must file currency transaction reports and suspicious activity reports and are prohibited from maintaining correspondent accounts for foreign shell banks.

Comments on the proposed rule are due to FinCEN on or before October 24, 2016. The proposed rule is available at: *https://www.gpo.gov/fdsys/pkg/FR-2016-08-25/pdf/2016-20219.pdf.*

NYDFS Adopts a Final Regulation Regarding Transaction Monitoring and Filtering Programs

On June 30, 2016, the New York State Department of Financial Services ("NYDFS") adopted 3 NYCRR Part 504 ("Part 504") which requires certain financial institutions to maintain a transaction monitoring program and a watch list filtering program with specific attributes, as detailed in the regulation. The new regulation applies to all banks, trust companies, private bankers, savings banks, savings and loan associations, check cashers and money transmitters chartered or licensed pursuant to the New York Banking law, as well as all branches and agencies of foreign banking corporations that are licensed by the NYDFS to conduct banking business in New York.

While less strict than the version proposed by NYDFS in December 2015, the final version of Part

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504 is more stringent and onerous than other existing federal and state anti-money laundering and OFAC regulations and gives the NYDFS wider latitude to pursue anti-money laundering and sanctions cases involving the institutions they supervise.

As adopted, Part 504 varies in certain respects from the proposal. There is no annual certification requirement for chief compliance officers, as was proposed. Instead, institutions subject to Part 504 must annually adopt and submit to the NYDFS either (1) a resolution by the Board of Directors (or its functional equivalent), or (2) a finding of a Senior Officer certifying, among other things, that, to the best of their knowledge, the institution is in compliance with the regulation.

In addition to the changes to the annual certification requirement, other changes from the proposal include the following:

- Removal of a reference to the possibility of criminal liability for the submission of an incorrect or false certification.
- Removal of a provision that would have made it a violation for institutions to change or alter the transaction monitoring and filtering program (1) to minimize filing suspicious activity reports; (2) as a response to inadequate resources; or (3) in an attempt to avoid complying with regulatory requirements.
- Includes a requirement that institutions document (and make available such documentation for inspection) any time they identify areas needing material improvement and any remediation attempts.

Part 504 is effective on January 1, 2017. The first submission of a resolution of the Board of Directors or finding by a Senior Officer will be required by April 15, 2018.

For the adopted version of Part 504, which includes the detailed requirements for the transaction monitoring program and the watch list filtering program, please visit: *http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp504t.pdf.*

CFTC UPDATE

CFTC Releases Its Final Staff Report on the Swap Dealer De Minimis Exception

On August 15, 2016, the Commodity Futures Trading Commission ("CFTC") released the final report of its staff (the "Staff") on the *de minimis* exception to the CFTC's definition of "swap dealer" (the "Final Report"). That exception, which permits a market participant not to have to register with the CFTC as a swap dealer if it conducts dealing activity in swaps below a specified notional amount threshold, is a key to many market participants' determinations that they need not register as a swap dealer. Specifically, CFTC regulations provide for a *de minimis* threshold of $3 billion in notional amount of dealing activity in swaps over a 12-month period, subject to an initial phase-in period currently in effect during which the *de minimis* threshold is $8 billion in notional amount over a 12-month period. However, those regulations also require the Staff to draft a report such as the Final Report and provide that nine months after publication of such report, and, after giving due consideration to that report and associated public comment, the CFTC may either terminate the phase-in period, thus reducing the *de minimis* threshold to $3 billion, or determine that it is in the public interest to propose an alternative to the $3 billion *de minimis* threshold amount. Although based on problematic data and limited in its conclusions, the Final Report thus is part of the process, important to unregistered swap market participants, by which the CFTC will determine whether or not to modify the scheduled implementation of a lower *de minimis* threshold level. If the *de minimis* threshold is reduced, as contemplated by CFTC regulations, additional market participants will likely become subject to the swap dealer registration requirement and to the substantial body of CFTC regulations that apply to swap dealers. For more information, please see our client alert at *https://media2.mofo.com/documents/160907-cftc-de-minimis-exception.pdf*.

CFTC Proposal to Amend CPO Reporting Rules

On August 5, 2016, the CFTC issued a proposal to amend its rules governing commodity pool annual reports, which, if adopted, would permit commodity pool operators ("CPOs") of a pool

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located outside the United States to use accounting standards established in certain enumerated non-U.S. jurisdictions in lieu of U.S. Generally Accepted Accounting Principles ("GAAP") when preparing the pool's financial statements. The proposal would also exempt a newly formed commodity pool from the audit requirement covering the first fiscal year when the period from pool formation to the fiscal year end is three months or less, under certain conditions. A conforming amendment would be made making the relief from the auditing requirement for pools that cease operations unavailable where such an exemption has been claimed. The proposed rules are available at *http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-18400a.pdf*. For more information, please see the BD/IA Regulator blog at *http://www.bdiaregulator.com/*.

CFTC Proposed Registration Relief for Non-U.S. Futures Commission Merchants, Commodity Pool Operators, Commodity Trading Advisors, and Introducing Brokers

On July 27, 2016, the CFTC proposed amendments to its rules that loosen the conditions for exemption from registration as a futures commission merchant, commodity pool operator, commodity trading advisor, and introducing broker for non-U.S. persons who act solely on behalf of persons located outside the United States, or on behalf of certain international financial institutions, in connection with commodity interest transactions (including swaps). The proposed rules, which essentially would codify and expand previously issued staff no-action relief, are available at *http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-18210a.pdf*. For more information, please see the BD/IA Regulator blog at *http://www.bdiaregulator.com/*.

CFPB UPDATE

CFPB Brings Enforcement Action Against Wells Fargo for Alleged "Abusive" Conduct

On September 8, 2016, the CFPB issued the largest civil money penalty in its history, $100 million, against Wells Fargo for allegedly "unfair" and "abusive" conduct related to the opening of deposit and credit card accounts and online banking enrolments without the customers' knowledge or consent. In addition to the CFPB's penalty, Wells Fargo must also pay $35 million to the OCC and $50 million to the City of Los Angeles.

According to the CFPB, sales goals and an incentive-based compensation program designed to increase cross-selling of banking products and services to existing customers, in the absence of adequate controls, create an environment in which employees can take advantage of customers in order to obtain higher bonuses. Because the customers allegedly had no knowledge of the new accounts, and thus could not avoid associated fees, the CFPB concluded that these activities were "unfair" and "abusive." For our client alert on the enforcement action, please visit *https://media2.mofo.com/documents/160909-cfpb-levies-largest-civil-money-penalty.pdf*.

CFPB, OCC, and Federal Reserve Propose Clarification to HPML Small Loan Exemption

On August 4, 2016, the CFPB, the OCC and the Federal Reserve (together, the "Agencies") jointly proposed to amend their respective regulations exempting certain small loans from the appraisal requirements that apply to lenders in connection with making higher-priced mortgage loans ("HPMLs").

The current HPML rule provides that the small loan threshold amount for exemption from the appraisal requirements is adjusted each January 1 based on any annual percentage increase in the Consumer Price Index ("CPI"). Commentary to the current rule explains how an adjustment would be handled in the case of an annual percentage decrease in the CPI; however, it does not explain how adjustments in future years should account for such a decrease.

The Agencies propose to add a three-part clarifying comment to the HPML rule. Part One clarifies that if the CPI does not increase year-over-year, the exemption threshold amount for the following year will not change. Part Two clarifies that, for the years that follow a decrease in the CPI, the exemption threshold amount is calculated based on the dollar amount that *would have resulted* if decreases and subsequent increases in the CPI had been taken into account. Part Three clarifies that the exemption threshold amount would only be adjusted if the calculation, accounting for decreases and subsequent increases in the CPI, results in a net increase in the threshold.

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For our client alert on the proposal, please visit *https://media2.mofo.com/documents/160907-hpml-requirements.pdf*

Post-HAMP Loss Mitigation Principles

On August 2, 2016, the CFPB published new guidance on loss mitigation for the mortgage industry in advance of the expiration of the U.S. Department of the Treasury's Home Affordable Modification Program ("HAMP") at the end of this year. The guidance, entitled CFPB's Principles for the Future of Loss Mitigation (the "Guidance"), outlines a recommended framework for industry-driven foreclosure relief programs tailored to the post-financial crisis mortgage market. Specifically, the Guidance calls on stakeholders in the mortgage servicing industry to build on HAMP's successes by adopting uniform standards for loss mitigation and loan modification options that are reasonable in today's market.

The core principles advocated by the CFPB to underpin future loss mitigation and loan modification frameworks are accessibility, affordability, sustainability, transparency and accountability. In discussing these principles, the CFPB highlights the success of practices like utilizing waterfall decision flows to help servicers make critical decisions in the loss mitigation or loan modification process; counselling homeowners to help them understand their options, and the potential consequences thereof, for loss mitigation; and using data to maintain transparency and accountability in the process.

For our client alert on the Guidance, please visit *https://media2.mofo.com/documents/160906-cfpb-hamp.pdf.*

CFPB Issues Debt Collection Proposal

On July 28, 2016, the CFPB issued an outline of proposals regarding the regulation of debt collection, entitled "Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered" (the "Outline"). The Outline, which is not a proposed rule under the Administrative Procedure Act but rather a precursor to a future proposed rule, is limited to the regulation of third-party debt collection. Rules pertaining to first-party debt collection may be issued separately. The small business process is mandated by the Dodd-Frank Act for CFPB rules that are anticipated to have a significant impact on small businesses.

Substantively, the Outline indicates that the CFPB will eventually issue new rules that are likely to require significant systems, documentation, and process changes for both creditors referring debt for collection or legal action and parties handling debt collection, including collection agencies and law firms. The Outline covers topics such as data integrity, debt substantiation and validation, debt transfers, frequency and method of consumer contact, statutes of limitation and litigation procedures, validation notices, collector fees, technology, and recordkeeping.

For our client alert on the Outline, please visit *https://media2.mofo.com/documents/160804cfpbdebtcollection.pdf.*

CFPB Publishes Updates to Regulatory Agenda

On June 9, 2016, the CFPB issued an outline of the agency's priorities through April 2017 (the "Agenda"). The Agenda revises the projected timeline for several highly anticipated rulemakings and indicates that CFPB's data collection and rulemaking initiatives will continue at a fast pace, at least throughout 2016 and 2017. These initiatives will have significant ramifications for companies providing a broad range of consumer financial products and services.

Included among the items on the CFPB's regulatory Agenda are topics such as arbitration; short-term, small-dollar loans; prepaid cards; mortgage servicing; overdrafts on deposit accounts; and data collection on certain business loans. Other topics on the CFPB's radar include mortgage disclosures, credit reporting, and student loan servicing.

For our client alert on the CFPB's Agenda, please visit *https://media2.mofo.com/documents/160609cfpbregulatoryagenda.pdf.* ■

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

Watch For

MSRB Press Release (September 14, 2016) – The MSRB received approval from the SEC on September 13, 2016, to establish an historical data product to provide institutions of higher education with post-trade municipal securities transaction data collected through the Real-Time Transaction Reporting System for purchase. The MSRB will announce the effective date of the RTRS Academic Data Product in a regulatory notice to be published no later than December 12, 2016, and the effective date will be no later than June 9, 2017.

September 9, 2016 – Beginning September 12, 2016, municipal advisor firms can enroll their municipal advisor representatives to take the MSRB's Municipal Advisor Representative Qualification Examination (Series 50). 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 MSRB is providing a one-year grace period, ending on September 12, 2017, to allow municipal advisor representatives to continue to engage in municipal advisory activities while preparing to take and pass the Series 50 exam.

September 9, 2016 – Effective August 17, 2016, new provisions of MSRB Rule G-37 address municipal advisors' political contributions and municipal advisory business. Municipal advisors are now required to disclose to the MSRB, on a quarterly basis, information about their political contributions to municipal entity officials, state or local political parties, and bond ballot campaigns, as well as information about municipal entities with which they have engaged in municipal advisory business. This information is submitted through electronic Form G-37 by the last day of the month following the end of each calendar quarter. The first submission period for municipal advisors opens October 1, 2016 and ends October 31, 2016.

CFTC Press Release 7442-16 (September 8, 2016) – The CFTC approved two final rules for system safeguards testing requirements, as well as a comparability determination for Japan's margin requirements for uncleared swaps.

Joint Press Release (September 8, 2016) – The FRB, FDIC & OCC released a report to the Congress and the Financial Stability Oversight Council on the activities and investments that banking entities may engage in under applicable law. Each agency prepared the section of the report relative to the banking entities that it supervises. Each of the three sections includes a discussion of permissible activities, risk mitigation, legal limitations, and specific recommendations as required by the Dodd-Frank Act.

September 6, 2016 – The MSRB has launched MuniEdPro℠, a suite of interactive, online courses about municipal market activities and regulations.

MSRB Press Release (September 2, 2016) – The MSRB has advanced a plan to require dealers to provide retail investors information about compensation dealers receive when buying municipal bonds from, or selling them to, investors. Currently, retail investors in municipal securities receive less information about the cost of their transactions than investors in the equity market. The MSRB's plan, which was submitted to the SEC for approval, seeks to provide municipal retail investors with meaningful and useful pricing information to help them better evaluate the overall cost of their transactions. If approved, the proposed mark-up disclosure rule will be effective no later than one year following SEC approval.

CFTC Press Release 7436-16 (September 1, 2016) – The CFTC's Division of Swap Dealer and Intermediary Oversight issued a time-limited, no-action letter stating that it will not recommend an enforcement action against a swap dealer subject to the September 1, 2016 compliance date for the CFTC's uncleared swap margin rules, subject to certain conditions, for failing to fully comply with the custodial arrangement requirements of CFTC regulation 23.157 prior to October 3, 2016. Due to certain practical and technical limitations, DSIO believes it is appropriate to provide this relief when a swap dealer is making diligent, good faith implementation efforts in this period of transition.

CFTC Press Release 7435-16 (September 1, 2016) – The CFTC is requesting public comment on proposed amendments to the Whistleblower Rules found in Part 165 of the CFTC's Regulations. The amendments would enhance the process for reviewing whistleblower claims and make related changes to clarify staff authority to administer the whistleblower program. The proposal will also, among other things, strengthen the CFTC's anti-retaliation authority to provide whistleblowers protection from retaliation through CFTC enforcement action under the Commodity Exchange Act. Comments must be submitted on or before September 29, 2016.

FINRA Regulatory Notice 16-34 (August 31, 2016) – FINRA is soliciting comment on a proposal to provide

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for a FINRA-sponsored inter-dealer quotation facility for all OTC equity securities. The comment period expires November 29, 2016.

SEC Press Release 2016-171 (August 29, 2016) – The SEC adopted amendments to a rule that would require security-based swap data repositories to make data available to regulators and other authorities, allowing them to share information and more effectively oversee the security-based swap market.

SEC Press Release 2016-168 (August 25, 2016) – The SEC adopted amendments to several Investment Advisers Act rules and the investment adviser registration and reporting form to enhance the reporting and disclosure of information by investment advisers. The amendments will improve the quality of information that investment advisers provide to investors and the Commission. The amendments will be published on the Commission's website and in the *Federal Register*. They will become effective 60 days after publication in the *Federal Register*, and advisers will need to begin complying with the amendments on Oct. 1, 2017.

FINRA Regulatory Notice 16-33 (August 24, 2016) – Effective Monday, September 12, 2016, firms that elect to use the ADF for trade reporting purposes only are subject to annual testing requirements (with exceptions for firms that qualify) and connectivity fees. The amended rule text is available in the online FINRA Manual.

MSRB Press Release (August 19, 2016) – The MSRB received approval from the SEC to shorten the time frame during which municipal securities dealers must resolve open inter-dealer failed transactions thereby reducing the cost and market risk associated with open transactions. The SEC's approval of changes to MSRB Rule G-12 mandates that beginning November 16, 2016, inter-dealer failed transactions be closed out within 10 calendar days with an allowance for an additional 10 calendar day extension at the buyer's discretion.

FINRA Regulatory Notice 16-32 (August 19, 2016) – Effective as of the close of business on January 10, 2017, FINRA will retire the web-based system firms currently use to submit short interest positions. On January 17, 2017, firms will begin submitting short interest reports to FINRA using a new web-based interface, which is accessible via the Firm Gateway. In addition, firms should note that some functionality will be affected by this change and is described in more detail herein. To provide firms with the ability to test any program modifications necessitated by these changes, FINRA will make a test environment available from October 3, 2016, through December 2, 2016.

CFTC Press Release 7427-16 (August 15, 2016) – The CFTC's Division of Swap Dealer and Intermediary Oversight issued the Swap Dealer *De minimis* Exception Final Staff Report. The Final Report supplements the Swap Dealer *De minimis* Exception Preliminary Report issued on November 18, 2015. The current *de minimis* threshold for swap dealer registration of $8 billion is scheduled to decrease to $3 billion in December 2017, unless the Commission takes further action. The Preliminary Report used available swap data to assess the *de minimis* exception level in light of the policy goals for swap dealer registration, and requested public comment on the report. The Final Report summarizes the public comments received in response to the Preliminary Report and provides further data analysis. It also discusses the *de minimis* exception alternatives noted in the Preliminary Report and identifies issues for the Commission's consideration.

FINRA Regulatory Notice 16-31 (August 12, 2016) – The SEC has approved FINRA's rule change amending FINRA Rule 4210 to establish margin requirements for Covered Agency Transactions. Covered Agency Transactions include (1) To Be Announced transactions, inclusive of adjustable rate mortgage transactions, (2) Specified Pool Transactions and (3) transactions in Collateralized Mortgage Obligations, issued in conformity with a program of an agency or Government-Sponsored Enterprise, with forward settlement dates, as discussed more fully in this *Notice*. The rule change becomes effective in two phases: effective date of risk limit determination requirements: December 15, 2016; effective date of all other requirements: December 15, 2017.

FINRA Regulatory Notice 16-30 (August 10, 2016) – FINRA reminds firms of their obligation under FINRA Rule 6730 to accurately enter the "time of execution" for transactions on TRACE trade reports. The "time of execution" of a transaction in a TRACE-eligible security generally is the time at which the parties to the transaction agree to all of the material terms sufficient to calculate the dollar price of the trade.

August 10, 2016 – The MSRB is reminding municipal advisors and municipal securities dealers that amendments to MSRB Rule G-37, on political

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contributions and prohibitions on municipal securities business and municipal advisory business, will become effective August 17, 2016. Also taking effect are related amendments to MSRB Rules G-8, on books and records, and G-9, on preservation of records, and Forms G-37 and G-37x. Among other changes, the amendments require municipal advisors to submit quarterly disclosures to the MSRB of certain political contributions and related information. The next quarterly deadline for political contribution disclosures is October 31, 2016.

CFTC Press Release 7422-16 (August 9, 2016) – The CFTC announced that it will publish in the *Federal Register* proposed amendments to CFTC regulation 3.3. The proposed amendments would provide futures commission merchants, swap dealers, and major swap participants additional time to file chief compliance officer annual reports and clarify the timing of the filing requirements applicable to swap dealers and major swap participants located in jurisdictions for which the CFTC has granted a comparability determination with respect to the contents of the reports. If adopted, the proposed rule would effectively codify and supersede CFTC Staff Letter No. 15-15 issued March 27, 2015. The CFTC is seeking comments on the proposed amendments. The comment period ends 30 days after the proposal's publication in the*Federal Register*.

MSRB Notice 2016-19 (August 9, 2016) – The MSRB published guidance, effective July 18, 2016, in question-and-answer format to support compliance with MSRB Rule G-14, Reports of Sales or Purchases of Municipal Securities. Rule G-14 requires municipal securities dealers to report all executed transactions in most municipal securities to the MSRB's Real-Time Transaction Reporting System within 15 minutes of the time of trade, with limited exceptions.

FINRA Regulatory Notice 16-29 (August 8, 2016) – FINRA is seeking comment on proposed amendments to FINRA Rule 3220 (Influencing or Rewarding Employees of Others), as well as on proposed FINRA Rule 3221 (Restrictions on Non-Cash Compensation), and proposed FINRA Rule 3222 (Business Entertainment). The comment period expires September 23, 2016.

CFTC Press Release 7421-16 (August 8, 2016) – The CFTC announced three separate measures that are designed to enhance the protection of customer funds. The CFTC approved an order to exempt Federal Reserve Banks that maintain customer accounts for derivatives clearing organizations from liability under the Commodity Exchange Act. In addition, the CFTC's Divisions of Clearing and Risk and Swap Dealer and Intermediary Oversight issued separate interpretative and no-action letters regarding the use of money market funds by DCOs and futures commission merchants. CFTC staff also announced no-action relief and rule interpretation regarding the use of money market funds by FCMs and DCOs. The interpretative and no-action letters address (a) the acceptance or holding of MMFs as margin collateral by DCOs in light of the requirements of Part 39 of CFTC regulations, and (b) the investment of customer funds in MMFs in light of the requirements of Regulation 1.25. The letters were issued to address the impact of amendments adopted by the SEC to SEC Rule 2a-7, requiring prime MMFs, and authorizing government MMFs, to retain authority to suspend participant redemptions and to impose liquidity fees under certain defined conditions. The amendments to SEC Rule 2a-7 take effect on October 14, 2016.

FINRA Regulatory Notice 16-28 (August 8, 2016) – Effective November 7, 2016, new FINRA Rule 4554 requires alternative trading systems to submit additional order information to FINRA. The rule text is available in the online FINRA Manual.

CFTC Press Release 7418-16 (August 4, 2016) – The CFTC announced two separate actions on how the rules related to the Dodd-Frank Act apply to cross-border transactions.

MSRB Notice 2016-18 (August 4, 2016) – The MSRB filed with the SEC an amendment to MSRB Rule G-37 to clarify that, consistent with the current regulatory policy under existing Rule G-37, contributions by persons who become associated with a dealer and become municipal finance professionals of the dealer, if made prior to August 17, 2016, are subject to the two-year look-back in Rule G-37 and may subject a dealer to a prohibition on municipal securities business. The amendment is in addition to amendments to Rule G-37, on political contributions and prohibitions on municipal securities business, and related amendments to MSRB Rules G-8, on books and records, and G-9, on preservation of records, and Forms G-37 and G-37x that are effective on August 17, 2016 and extend the core standards under Rule G-37 to municipal advisors, their political contributions and the provision of municipal advisory business.

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Federal Reserve Press Release (August 2, 2016) – The Federal Reserve Board and the FDIC announced that 38 firms will be required to submit their next resolution plans by December 31, 2017. Previously, the firms were required to submit their next plans by December 31, 2016. These firms include 36 domestic bank holding companies and foreign banking organizations, as well as two nonbank financial companies designated by the Financial Stability Oversight Council.

Federal Reserve Press Release (August 1, 2016) – Five federal agencies today announced a final rule exempting certain commercial and financial end users from margin requirements for certain swaps not cleared through a clearinghouse. The exemptions were first adopted by interim final rule published in the *Federal Register* in November 2015 with a request for public comment. The final rule discusses the comments received and adopts the earlier interim final rule as final without change. In a separate rulemaking published in November 2015, initial and variation margin requirements were established for non-cleared swaps, as required by the Dodd-Frank Act.

Federal Reserve Press Release (August 1, 2016) – The Federal Reserve Board invited comment on an interim final rule adjusting the Board's maximum civil money penalties, as required by law. The interim final rule is effective on August 1, 2016, and will apply to those penalties assessed after this date. The Board will accept comments until August 30, 2016.

FDIC Press Release (July 29, 2016) – The FDIC is seeking comments on updates to its guidelines for institutions to appeal certain material supervisory determinations. Further, the FDIC is seeking comments on draft guidance regarding third-party lending as part of a package of updated policies and procedures. Comments on the supervision appeals guidelines will be accepted until 60 days after it is published in the *Federal Register*. Comments on the third-party lending guidance will be accepted until September 12, 2016.

FINRA Regulatory Notice 16-26 (July 29, 2016) – FINRA adopted amendments relating to the Regulation NMS plan to address extraordinary market volatility. The effective date is August 22, 2016.

CFTC Press Release 7413-16 (July 28, 2016) – The CFTC and four Canadian authorities have signed counterparts to a Memorandum of Understanding to enhance supervision of cross-border entities. The scope of the MOU includes markets and organized trading platforms, central counterparties, trade repositories, and intermediaries, dealers, and other market participants.

CFTC Press Release 7412-16 (July 27, 2016) – The CFTC proposes to amend the conditions for exemption from registration for certain foreign persons in connection with commodity interest transactions solely on behalf of persons located outside the U.S., or on behalf of certain international financial institutions. The CFTC is seeking comment on the proposed amendments. The comment period ends 30 days after the proposal's publication in the *Federal Register*.

CFTC Press Release 7410-16 (July 25, 2016) – The CFTC's Division of Swap Dealer and Intermediary Oversight is issuing a staff advisory regarding chief compliance officer reporting line requirements for swap dealers, major swap participants, and futures commission merchants under Commission Regulation 3.3. The advisory clarifies the Regulation's required elements and addresses additional supervisory relationships that a chief compliance officer may have with senior management in addition to those with the board or the senior officer of the registrant.

Federal Reserve Press Release (July 25, 2016) – The Federal Reserve Board extended until September 16, 2016, the comment period for the advanced notice of proposed rulemaking detailing conceptual frameworks for capital standards that could apply to systemically important insurance companies and to insurance companies that own a bank or thrift. The Board's ANPR presents one approach—called the consolidated approach—that would apply to systemically important insurance companies and a second approach—called the building block approach—for the supervised insurance companies that own a bank or thrift. Originally, comments were due by August 17, 2016.

FINRA Regulatory Notice 16-25 (July 22, 2016) – FINRA reminds member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time and do not forfeit that right under FINRA rules by signing any agreement with a forum selection provision specifying another dispute resolution process or an arbitration venue other than the FINRA arbitration forum. In addition, FINRA reminds member firms that FINRA rules do not permit member firms to require

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associated persons to waive their right to arbitration under FINRA's rules in a predispute agreement.

CFTC Press Release 7409-16 (July 21, 2016) – The CFTC's Division of Clearing and Risk issued guidance to clearinghouses to further the development of Recovery Plans and Wind-down Plans. For clearinghouses, or Derivatives Clearing Organizations, the development of these plans is a critical element of risk management and contingency planning to address the extreme circumstances that could threaten DCOs' viability and financial strength, and is required by CFTC regulations.

CFTC Press Release 7408-16 (July 18, 2016) – The CFTC announced that it has issued an Order extending, by one year, the designation of the utility operated by DTCC-SWIFT as the provider of legal entity identifiers, or LEIs, as required by CFTC's swap data recordkeeping and reporting rules. This extension allows more time for the global LEI system to become fully operational.

FINRA Regulatory Notice 16-24 (July 14, 2016) – FINRA and the other U.S. members of the Intermarket Surveillance Group have modified certain equity and option data elements for Electronic Blue Sheets which will become effective on December 30, 2016. FINRA and the other ISG members are modifying certain equity data elements to be consistent with NYSE Regulation Information Memorandum Number 16-2 and NYSE Arca Equities Regulatory Bulletin Number 16-39. FINRA and the other ISG members are also updating certain data elements in response to the SEC approval, dated June 17, 2016, of the Investors Exchange, LLC (IEX).

CFTC Press Release 7406-16 (July 13, 2016) – The CFTC's Division of Market Oversight announced that it has granted ICE Futures U.S. a 15-day extension of the public comment period and a 45-day extension of the stay period for Submission No. 16-67, dated June 1, 2016. ICE Futures U.S. had requested both extensions. Comments must be submitted on or before July 29, 2016. The extended stay will expire on October 28, 2016.

SEC Press Release 2016-140 (July 13, 2016) – The SEC voted to propose rules that for the first time would require broker-dealers to disclose the handling of institutional orders to customers. The proposed rules also would expand the information included in existing retail order disclosures. The Commission is seeking public comment on the proposal for 60 days following its publication in the *Federal Registerr*.

SEC Press Release 2016-139 (July 13, 2016) – The SEC announced that it has adopted amendments and guidance related to rules regarding the regulatory reporting and public dissemination of security-based swap transactions, known as Regulation SBSR. The new rules and guidance are designed to increase transparency in the security-based swap market.

Federal Reserve Press Release (July 7, 2016) – Formalizing its prior commitment to facilitate the orderly implementation of section 619 of the Dodd-Frank Act, commonly known as the Volcker Rule, the Federal Reserve Board announced that it will extend until July 21, 2017 the conformance period for banking entities to divest ownership in certain legacy investment funds and terminate relationships with funds that are prohibited under the rule. The Board announced in December 2014 that it would make this extension to provide for orderly divestitures and to prevent market disruptions. This is the final of the three one-year extensions that the Board is authorized to grant. This extension would permit banking entities additional time to divest or conform only "legacy covered fund" investments, such as prohibited investments in hedge funds and private equity funds that were made prior to December 31, 2013. This extension does not apply to investments in and relationships with a covered fund made after December 31, 2013 or to proprietary trading activities; banking entities were required to conform those activities to the final rule by July 21, 2015.

CFTC Press Release 7402-16 (July 6, 2016) – CFTC staff issued an advisory reminding commission registrants of compliance requirements regarding suspicious activity reporting and economic sanctions programs.

FINRA Regulatory Notice 16-22 (June 30, 2016) – The SEC has approved FINRA's proposed rule change to adopt a new, consolidated rule governing accounts opened or established by associated persons at firms other than the firm at which they are employed. The new rule—FINRA Rule 3210 (Accounts At Other Broker-Dealers and Financial Institutions)—helps facilitate effective oversight of such accounts. New FINRA Rule 3210, effective April 3, 2017, replaces NASD Rule 3050, Incorporated NYSE Rules 407 and 407A and Incorporated NYSE Rule Interpretations 407/01 and 407/02.

SEC Press Release 2016-133 (June 28, 2016) – The SEC proposed a new rule that would require registered

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investment advisers to adopt and implement written business continuity and transition plans. The proposed rule is designed to ensure that investment advisers have plans in place to address operational and other risks related to a significant disruption in the adviser's operations in order to minimize client and investor harm. In addition to the proposed rule, SEC staff issued related guidance addressing business continuity planning for registered investment companies, including the oversight of the operational capabilities of key fund service providers. The comment period will be 60 days after publication in the *Federal Register*.

OCC Bulletin 2016-22 (June 21, 2016) – The OCC, FRB and the FDIC are seeking comment on a proposed rule that would strengthen the liquidity risk management of large banks and savings associations. The proposed NSFR rule would create a longer-term funding requirement designed to work in concert with the shorter-term liquidity coverage ratio rule. While the LCR rule requires large banks and savings associations to hold sufficient high-quality liquid assets to survive a stress scenario lasting 30 days, the proposed NSFR rule would require these institutions to have sources of funding that are stable over a one-year period. The notice of proposed rulemaking was published in the *Federal Register* on June 1, 2016, and comments are due on August 5, 2016.

Available Publications

OCC Bulletin 2016-27 (September 9, 2016) – The FFIEC has revised the "Information Security" booklet of the *FFIEC Information Technology Examination Handbook*. It provides guidance to examiners and addresses factors necessary to assess the level of security risks to a financial institution's information systems. The "Information Security" booklet describes effective information security program management, including the following phases of the life cycle of information security risk management: risk identification; risk measurement; risk mitigation; and risk monitoring and reporting. Additionally, the booklet provides an overview of information security operations, including the need for effective threat identification, assessment, and monitoring. The booklet also contains updated examination procedures to help examiners measure the adequacy of the institution's security culture, governance, information security program, security operations, and assurance processes.

OCC News Release 2016-107 (September 8, 2016) – The FRB, FDIC and OCC released a report to the Congress and the Financial Stability Oversight Council on the activities and investments that banking entities may engage in under applicable law. Section 620 of the Dodd-Frank Act required the federal banking agencies to conduct the study and report to Congress on the types of activities and investments permissible for banking entities, the associated risks, and how banking entities mitigate those risks. For the purpose of this study, banking entities include insured depository institutions and any company that controls an insured depository institution or is treated as a bank holding company under the International Banking Act of 1978. The study also covers any affiliate or subsidiary of such companies. Each agency prepared the section of the report relative to the banking entities that it supervises. Each of the three sections includes a discussion of permissible activities, risk mitigation, legal limitations, and specific recommendations as required by the Dodd-Frank Act.

OCC News Release 2016-96 (August 18, 2016) – The OCC released an update to the Bank Accounting Advisory Series. The BAAS covers a variety of topics and promotes consistent application of accounting standards among national banks and federal savings associations. This update includes recent answers to frequently asked questions from the industry and examiners covering areas such as contingencies, and fair value accounting.

OCC News Release 2016-25 (July 29, 2016) – The OCC issued the "Corporate and Risk Governance" booklet of the *Comptroller's Handbook*. This new booklet updates, consolidates, and rescinds a number of *Comptroller's Handbook* booklets and provides examiners with an overview of corporate and risk governance, the associated risks, the board and management's roles in these activities, and examination procedures to use during supervisory activities that focus on evaluating national banks' and FSAs' corporate and risk governance.

Program Update

2016 Legal and Legislative Conference

Register today! FMA's 25th **Legal & Legislative Conference** will take place **November 3 – 4** at the Hyatt Regency (on Capitol Hill) 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. Participants are provided with a unique opportunity to share information on current legal and regulatory developments as well as network with peers and regulators in an intimate environment. And, **attendees are eligible for CLE and CPE accreditation (among others)**.

The Program Planning Committee has devised a timely agenda including noted industry leaders and senior regulatory officials. 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** *(Clark Hill PL)*.

The agenda, focusing on current areas of regulatory and Congressional activity/scrutiny, includes these sessions and confirmed speakers:

Banking General Counsels

- Laurie Schaffer ■ FRB
- Karen Solomon ■ OCC
- Charles Yi ■ FDIC

Capital and Liquidity

- Benjamin McDonough ■ Federal Reserve Board
- Cory Stefansson ■ BlackRock
- Dafina Stewart ■ Federal Reserve Board
- Mark Welshimer ■ Sullivan & Cromwell LLP

Developments in AML and Sanctions Regulation and Enforcement

- Alma Angotti ■ Navigant
- Sharon Cohen Lewis ■ WilmerHale
- Jaikumar Ramaswamy ■ Bank of America

The Evolving Cyber Landscape

- Luke Dembosky ■ Debevoise & Plimpton LLP
- Jenny Menna ■ U.S. Bank

2-for-1 team, "first-timer" and government/regulatory/SRO discounts are available.

- Steven Polansky ■ FINRA
- Jeffrey Ziesman ■ Bryan Cave LLP

Developments in Derivatives Regulation

- Cliffe Allen ■ National Futures Association
- Di Bruning ■ Barclays
- Brian Bussey ■ SEC
- David Mengle ■ National Futures Association

Department of Labor Conflicts of Interest Rulemaking

- Anthony Cipiti, Jr. ■ Nationwide Financial Legal
- Susan Krawczyk ■ Sutherland Asbill & Brennan LLP
- Alan Lebowitz ■ Evercore Trust Company
- Eric Marhoun ■ Fidelity & Guaranty Life

Securities General Counsels

- Robert Colby ■ FINRA
- Susan Milligan ■ CFTC
- Michael Post ■ MSRB
- Representative ■ SEC *(Invited)*

SEC Division Reports

- Marian Fowler ■ Investment Management
- Anthony KellyEnforcement
- Christina McGlosson-Wilson ■ Economic and Risk Analysis
- Elizabeth Murphy ■ Corporation Finance
- Carrie O'Brien ■ OCIE
- Heather Seidel ■ Trading and Markets

FinTech Regulatory Landscape

- Racquel Russell ■ FINRA
- Barbara Stettner ■ Allen & Overy LLP
- Julie Williams ■ Promontory Financial Group, LLC

To view the complete program, go to ***www.fmaweb.org*** and click on the pdf. Online registration is also available.

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Program Update *(continued from page 25)*

Please alert your colleagues to this annual fall conference (someone may need CLE or CPE by year-end). And, contact Dorcas Pearce (***dp-fma@starpower.net*** or 202/544-6327) if you have questions or wish to register.

FMA's room block at the Hyatt Regency expires **October 12**. If there's a chance you might need overnight accommodation, please contact the hotel before that date to book a room at FMA's group rate of $269. After October 12, room rates may increase dramatically. If the hotel is sold out, FMA has a few rooms in reserve that will be given out on a first-come, first-served basis. Contact Dorcas Pearce right away if you need assistance.

FMA gratefully acknowledges these sponsors of FMA's 2016 Legal and Legislative Issues Conference

WilmerHale

Navigant

Davis Polk

pillsbury

Sullivan & Cromwell LLP

2017 Securities Compliance Seminar

Save these dates – April 26-28, 2017!

FMA's **2017 Securities Compliance Seminar** will take place at the **new B Ocean Hotel** in **Fort Lauderdale, Florida** next spring. This annual program is a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys and regulators.

The Planning Committee will soon 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 suggestions. Please note…speakers receive a complimentary registration and are encouraged to attend as much of the seminar as possible.

FMA needs your input! A **survey** will be emailed shortly asking for hot topic/best practice ideas and speaker recommendations…*you may even choose to volunteer!* **Please email your suggestions to Dorcas Pearce by October 14.**

CPE / CLE accreditation (among others) will be available, so be sure to budget for, and plan to attend, the 26th annual Securities Compliance Seminar next spring.

Who's News

Neil Bohlen has been promoted to Audit Director/ Wealth & Investment Management Audit Team at Wells Fargo Audit Services.

Ruth Burgess, formerly SVP & CCO at Invest Financial Corporation, has retired after 31 years in the financial services industry. Congratulations and best of luck, Ruth!

Katrina Carroll, formerly Counsel at WilmerHale, has joined LPL Financial in Charlotte, NC as its Chief Anti-Money Laundering Officer.

Nicole Clement, formerly a Critical Infrastructure Officer at the Office of the Comptroller of the Currency, has joined Promontory Financial Group's U.S. Cyber Practice as a Principal.

Beverly Cole has been named Deputy Comptroller for Compliance Supervision at the Office of the Comptroller of the Currency.

Fabrice Coles, formerly Counsel in the Office of Sen. Gary Peters, has joined the U.S. Department of the Treasury as Associate Manager for Legislative and External Affairs, CDFI Fund.

Mike Dondarski has been named Assistant Director for Enforcement at the Office of Foreign Assets Control, U.S. Department of the Treasury.

Rachel Dondarski, formerly OFAC's Senior Advisor/Compliance Programs, Sanctions Compliance & Evaluation, has been promoted to Chief/Regulated Industries Oversight and Evaluation.

Carlos Fiol, Manager/Monitoring & Risk at the FDIC, has retired after 32 years of government service with FSLIC, RTC and the FDIC. Best of luck, Carlos!

Elaine Greenberg, formerly a Partner at Orrick, Herrington & Sutcliffe LLP and also the former head of the SEC's municipal enforcement unit, has joined Greenberg Traurig, LLP as a shareholder in their Washington, DC office.

Bridget Hagan has been named Partner at The Cypress Group.

Crystal Kaldjob, formerly an Associate at Sidley Austin, has joined Morrison & Foerster's Financial Services Group as an Associate in their DC office.

Tim Keeton, formerly Head of Senior Investors & Advisors Compliance, AVP at LPL Financial, has joined TIAA as Manager, Marketing Supervisory Controls.

Ernesto Lanza, formerly a Shareholder at Greenberg Traurig LLP and Deputy Executive Director/Chief Legal Officer of the Municipal Securities Rulemaking Board, has joined Clark Hill PLC as Senior Counsel in their Washington, DC office.

Patrick McGovern, formerly a Senior Audit Specialist at E*TRADE Financial, has joined Wells Fargo as an Operational Risk Consultant.

Tim Maher, formerly VP/Internal Audit at Atlas Energy Group, LLC, has joined Cardone Industries in Philadelphia as Director/Internal Audit.

Jennifer Marietta-Westberg, Deputy Chief Economist and Deputy Director of the SEC's Division of Economic and Risk Analysis, is planning to leave the agency after 10 years of public service to join the private sector.

David Medine, formerly Chairman of the Privacy and Civil Liberties Oversight Board, has joined the Consultative Group to Assist the Poor, a global partnership housed at the World Bank, whose mission is to increase access to the financial services the poor in developing countries need to improve their lives. He will consult and advise on privacy and consumer protection issues.

C. Dabney O'Riordan has been named co-chief of the Division of Enforcement's Asset Management Unit, a national specialized unit that focuses on misconduct by investment advisers, investment companies, and private funds. She joins Anthony Kelly as co-chief of the unit and succeeds Marshall Sprung, who left the agency in April.

Jim Reilly, formerly Managing Director & CCO at TD Ameritrade, has joined The Humane Society of the United States as Investor Engagement Manager.

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Who's News *(Continued from page 27)*

Frank Ruester, former Senior Internal Audit Analyst at Commerce Bank, has joined Kansas City Southern Railroad as Audit Manager.

Kristin Snyder has been named Co-National Associate Director of the Investment Adviser/ Investment Company examination program in the SEC's Office of Compliance Inspections and Examinations. She joins Co-National Associate Director Jane Jarcho.

Sara Surrells has been named Senior Manager, Third Party Oversight at E*TRADE Financial Corporation.

Dan Tannebaum has been admitted to the Partnership of PricewaterhouseCoopers and will serve as part of the leadership of the Financial Crimes Practice.

Adam Trost, formerly a Senior Supervisory Financial Analyst at the Federal Reserve Board, has joined Ernst & Young as an Executive Director in their Washington, DC office.

Jerome Walker, formerly a Partner at Windels Marx Lane & Mittendorf, LLP, has joined Horgan Rosen Beckham & Coren, LLP as a Partner in their Los Angeles office.

Rich Ward, formerly CCO and Head of Operational Risk at nabSecurities/National Australia Bank, has joined Exotix USA Inc. as CCO/COO.

Kit Wilson, formerly EVP & Deputy General Counsel at Citizens Financial Group Inc., has joined HSBC Global Banking and Markets in Hong Kong as Deputy General Counsel.

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.

Position Sought

A top performing Broker-Dealer and Bank Compliance Executive with established expertise in the development, and implementation of risk based Internal Controls Supervisory Testing and FINRA CEO Certification programs, Financial and Brokerage Operations, Brokerage and Bank Audit Programs, Financial and Operational Risk Management, Equity, Fixed Income, Options, and Mutual Fund Trading, Custody and Clearing Arrangements, and OATS Reporting among other industry regulatory expertise developed at four Fortune 500 Broker-Dealers and Banks over more than twenty years. Please e-mail or phone for Resume and other additional information – 646/808-5092 (c) or *rtbbrcllc@gmail.com* (Richard Thayer Burrow).