Katten
KattenMuchinRosenman LLP
Corporate & Financial
Weekly Digest
May 26, 2017 Volume XII, Issue 20

DERIVATIVES

See "ESMA Publishes Opinion on the Meaning of Traded on a Trading Venue" in the EU Developments section.

New FX Code of Conduct

The Foreign Exchange Working Group (FXWG), operating under the auspices of the Bank for International Settlements, has published a final version of its "FX Global Code" (the "Code"), a code of conduct for foreign exchange markets. (This version incorporates Part 1 of the Code that was published in May 2016.) The Code was developed to provide a common set of guidelines to promote the integrity and effective functioning of wholesale foreign exchange markets. The Code does not, however, impose legal or regulatory obligations on "Market Participants," a term that encompasses most entities (including trading platforms) active in wholesale foreign exchange. The Code will be collectively owned and maintained by the Global Foreign Exchange Committee, a new global association of regional FX committees.

The Code is organized around six leading principles:

- Ethics: Market Participants are expected to behave in an ethical and professional manner to promote the fairness and integrity of the FX Market.
- Governance: Market Participants are expected to have a sound and effective governance framework to provide for clear responsibility for and comprehensive oversight of their FX Market activity and to promote responsible engagement in the FX Market.
- Execution: Market Participants are expected to exercise care when negotiating and executing transactions in order to promote a robust, fair, open, liquid and appropriately transparent FX Market.
- Information Sharing: Market Participants are expected to be clear and accurate in their communications and to protect confidential information while promoting effective communication that supports a robust, fair, open, liquid and appropriately transparent FX Market.
- Risk Management and Compliance: Market Participants are expected to promote and maintain a robust control and a compliance environment to effectively identify, manage and report on the risks associated with their engagement in the FX Market.
- Confirmation and Settlement Processes: Market Participants are expected to put in place robust, efficient, transparent and risk-mitigating post-trade processes to promote the predictable, smooth and timely settlement of transactions in the FX Market.

There are no novel elements in the Code, but it does contain a useful annex of specific, illustrative examples of conduct that is either consistent or inconsistent with the Code.

The FXWG has developed a blueprint for achieving widespread adoption of the Code that relies heavily on central banks leading by example and encouraging Market Participants and FX trade associations to adhere to the Code by making public Statements of Commitment. The blueprint anticipates that most Market Participants will adhere to the Code in the next 6 to 12 months.

The text of the Code is available here.

The website of the new Global Foreign Exchange Committee is available here.

CFTC

CFTC Approves Amendments to Recordkeeping Requirements

On May 23, the Commodity Futures Trading Commission approved amendments to Regulation 1.31, which contains the recordkeeping requirements under the Commodity Exchange Act and CFTC regulations. The final rule adopts the amendments as proposed with a few exceptions. The proposed amendments are discussed in the January 13 edition of the *Corporate & Financial Weekly Digest*.

The changes to Regulation 1.31 modernize and make technology neutral the form and manner in which regulatory records must be kept. The amendments are intended to provide greater flexibility regarding the retention and production of all regulatory records under a principles-based approach. The amendments do not change the current requirements regarding the types of records to be inspected, produced, or maintained under CFTC regulations.

The amendments go into effect 90 days after publication of the final rule in the *Federal Register*. The CFTC release is available here.

CFTC Approves Amendments to Whistleblower Rules

On May 22, the Commodity Futures Trading Commission approved amendments to the whistleblower rules in 17 CFR Part 165. The amended rules strengthen the anti-retaliation protections for whistleblowers and enhance the process for review of whistleblower claims.

Among other changes, the amended rules:

1. permit the CFTC or the whistleblower to bring an action against an employer for retaliation against a whistleblower;
2. prohibit employers from preventing a potential whistleblower from contacting the CFTC staff about a possible violation of the Commodity Exchange Act through a confidentiality, pre-dispute arbitration or similar agreement;
3. revise the eligibility requirements for whistleblowers;
4. clarify the rules regarding awards for Related Actions (including awards provided by the Securities and Exchange Commission);
5. introduce additional steps in the claims review process and clarify the contents of the records for award determinations; and
6. explain that the Director of Enforcement may disclose whistleblower identifying information when deemed necessary or appropriate.

The amended rules will go into effect 60 days after publication in the *Federal Register*. A fact sheet summarizing the amendments is available here.

UK DEVELOPMENTS

FCA Publishes Statement on National Cyber Attack and Webpage on Cyber Resilience

On May 13, the day after the start of the widespread “WannaCry” ransomware cyber-attack, the UK Financial Conduct Authority (FCA) published a statement on the cyber-attack. The statement advised firms to review guidance issued by the National Cyber Security Centre. If firms were affected by the attack, it advised them to contact Action Fraud and notify their regulator.

The FCA also published a new webpage on cyber resilience on May 18. The webpage reinforces the importance of firms having a “security culture”—from the board of directors down to every employee. The webpage also acts as a repository for the FCA and other government agency’s publications on cybersecurity, as well as details on how to report a cyber incident.

The statement and webpage are available here and here.

EU DEVELOPMENTS

ESMA Publishes Opinion on the Meaning of Traded on a Trading Venue

On May 22, the European Securities and Markets Authority (ESMA) published an opinion regarding the implementation of the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR). The opinion clarifies the concept of “traded on a trading venue” (TOTV), which is relevant for a number of provisions under MiFID II and MiFIR, particularly the following:

- pre-trade and post-trade transparency requirements on market operators and investment firms operating a trading venue as well as for investment firms (including systematic internalizers) operating over-the-counter (OTC);
- trading obligations for shares and derivatives; and
- transaction reporting obligations and reference data obligations on investment firms and operators of trading venues.

The opinion clarifies the concept of TOTV for OTC derivatives, and in particular which transactions in derivatives concluded outside of trading venues are subject to the transaction reporting and transparency requirements. ESMA is of the view that only OTC derivatives sharing the same reference data details (other than venue-specific data fields) as the derivatives traded on a trading venue should be considered to be TOTV and, hence, subject to the MiFIR transparency and transaction reporting requirements.

ESMA concludes by acknowledging that what is to be considered the “same” reference data details may need to be revisited, taking into account the evolution of markets after MIFID II and MiFIR go into effect on January 3, 2018. ESMA plans to monitor the application of the concept of TOTV, and, in particular, the ratio of derivatives that are considered TOTV compared to overall OTC derivatives trading.

The opinion is available here.

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

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