Navigating the issues
Securities Enforcement
Global Update
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President Trump Nominates Commissioner
On July 18, 2017, President Trump announced his intention to nominate Hester Maria Peirce to be a Commissioner of the Securities and Exchange Commission (SEC). Ms. Peirce is a Senior Research Fellow and Director of the Financial Markets Working Group at the Mercatus Center at George Mason University, where she has worked since 2012. Before that, Ms. Peirce worked on Senator Richard Shelby’s staff on the Senate Committee on Banking, Housing and Urban Affairs. She also worked at the SEC as a Staff Attorney in the Division of Investment Management and as Counsel to Commissioner Paul Atkins.

Supreme Court Reins in SEC’s Enforcement Powers
In a unanimous decision, the US Supreme Court ruled that SEC disgorgement constitutes a penalty subject to the five-year statute of limitations for civil monetary penalties. The justices found in favor of investment adviser, Charles Kokesh, who had been ordered to pay $2.4 million in penalties and $34.9 million in disgorgement after a federal court jury found him liable for misappropriating investor money from four funds for over 12 years. The bulk of the disgorgement consisted of proceeds misappropriated outside of the five-year limitations period. After losing at the US Court of Appeals for Tenth Circuit, Kokesh appealed to the Supreme Court, which agreed to hear the case to resolve a circuit split.

The Supreme Court laid out two principles that determine whether a sanction, including disgorgement, is a penalty: (1) if the wrongful act was perpetrated against the public rather than an individual; and (2) if the sanction is used to punish the offending party and deter others from engaging in similar behavior rather than compensating victims. It then applied these principles in finding that SEC disgorgement “bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and is intended to deter, not to compensate.” The SEC had argued that disgorgement was equitable relief to restore the status quo, not a punishment. But the Court noted that “SEC disgorgement sometimes exceeds the profits gained as a result of the violation” and “sometimes is ordered without consideration of a defendant’s expenses that reduced the amount of illegal profit.” Thus, “disgorgement does not simply restore the status quo; it leaves the defendant worse off.”

The result that claims for disgorgement in SEC enforcement proceedings must commence within five years of the underlying conduct is a serious blow to the SEC. In fiscal year 2016, the SEC collected $3 billion in disgorgement or twice what it collected in other monetary penalties. The five-year limitation on both civil penalties and now disgorgement will require the SEC to complete its investigations more rapidly.

The full opinion can be accessed here.

SEC Stays Administrative Proceedings Subject to Tenth Circuit Review
The SEC has stayed administrative proceedings assigned to administrative law judges (ALJs) where respondents could seek review in the Tenth Circuit. In Bandimere v. SEC, the Tenth Circuit found SEC ALJs were unconstitutionally appointed inferior officers since they exercise significant discretion in carrying out important functions, including the power to find respondents liable, to impose sanctions, and to enter default judgments. The court denied the SEC’s petition for rehearing before the entire panel.
As a result, the SEC ordered the stay: “[I]n light of the U.S. Court of Appeals for the Tenth Circuit’s recent decision denying rehearing en banc in Bandimere v. SEC, we find it prudent to stay all administrative proceedings assigned to an administrative law judge in which a respondent has the option to seek review in the Tenth Circuit of a final order of the Commission.” The stay took effect immediately.

Meanwhile, a DC Circuit decision, Raymond J. Lucia Companies, Inc. v. SEC, upheld the constitutionality of the SEC’s ALJs. But that decision was vacated and on May 24 the court heard oral arguments on rehearing en banc. On June 26, the 10-judge panel of the DC Circuit voted 5-5 and denied a bid to overturn an earlier decision that upheld the constitutionality of the SEC’s ALJs. The split decision along with the Tenth Circuit decision increases the chances that the issue will wind up at the Supreme Court. The SEC stay, however, may indicate serious concern by the Commission of the potential outcome of such a Supreme Court decision.

Second Circuit Vacates Convictions in LIBOR Manipulation Scandal

In a decision likely to cause global reverberations in the realm of cross-border enforcement, the US Court of Appeals for the Second Circuit has vacated the convictions in the first US criminal appeal related to the manipulation of the London Interbank Offered Rate (LIBOR). In United States v. Allen, No. 16–898–cr (L) (2d Cir. July 19, 2017), the Second Circuit prohibited the derivative use of testimony lawfully compelled by UK authorities and set a high hurdle for introducing evidence in US criminal trials.

The international implications of this decision are significant. The Second Circuit’s decision in Allen will make it more difficult for US enforcement agencies to gather usable evidence in the cross-border context, and places the risk of using compelled testimony squarely on those agencies. To alleviate that risk, US authorities are likely to seek heightened cooperation with their foreign counterparts. In the long-term, increased collaboration among enforcement authorities could contribute to a more general shift toward the adoption of a US-style approach to enforcement actions.

For more information on this decision and its potential impact, see a Legal Alert drafted by Eversheds Sutherland.

Seventh Circuit Upholds First-Ever “Spoofing” Conviction

On August 8, 2017, a three-judge panel of the US Court of Appeals for the Seventh Circuit unanimously upheld the first-ever criminal conviction of a New Jersey futures trader for the manipulative trading practice known as “spoofing.” The court affirmed his November 2015 jury conviction, for which he was sentenced to three years in prison.

“Spoofing” is a market manipulation tactic criminalized under the Dodd-Frank Act that involves placing bids to buy or sell securities with the intent to cancel them before execution. This tactic creates an illusion of supply and demand that artificially manipulates the market for the underlying securities. Here, the defendant commissioned and employed high-frequency trading methodologies and computer algorithms to rapidly place large and small trade orders on opposite sides of various commodities markets. At trial, prosecutors said that his scheme allowed him to make $1.4 million in less than three months in 2011.

On appeal, the defendant argued that the anti-spoofing provision was unconstitutionally vague and could give rise to arbitrary enforcement. The Seventh Circuit panel rejected the defendant’s arguments, holding that the anti-spoofing provision is not unconstitutionally vague because it “provides clear notice and does not allow for arbitrary enforcement” because it requires “the intent to cancel the bid or offer before execution.” This ruling sets a favorable precedent that will certainly be considered by other circuits and the government in its future enforcement efforts. The SEC has brought a series of enforcement cases involving spoofing, and the Staff has publicly stated its continued focus on these manipulative schemes.

For more information on this decision and its potential impact, see the Legal Alert drafted by Bruce Bettigole and Adam Pollet.

SEC Focuses on the Importance of a Culture of Continuous Cybersecurity

On August 7, 2017, the SEC’s Office of Compliance Inspections and Examinations (OCIE) issued a “Risk Alert” containing the results of its Cybersecurity 2 Initiative, which reveals a critical cybersecurity truth: effective cybersecurity is not a matter of one-and-done, but rather a senior-management-led cultural shift toward a holistic, proactive, risk-based and well-practiced cyber strategy. While significant progress has been made by firms, there remain areas for improvement, including failure to update cybersecurity programs and a lack of periodic employee training on cybersecurity. The Risk Alert also detailed best practices observed during OCIE’s review, including maintaining an inventory of data, information and vendors; implementing processes for testing vulnerabilities; establishing and enforcing controls to access data and systems; and perhaps most importantly, having an engaged senior management.

In an article published in Law360, Brian Rubin and Michael Bahar highlight the results of OCIE’s findings and the key takeaways.

FINRA Continues Push to Protect Senior Investors

Recently, the Financial Industry Regulatory Authority’s (FINRA) National Adjudicatory Council (NAC) introduced new sanction guidelines that allow the NAC and FINRA staff to consider the vulnerability of customers in determining appropriate sanction levels. The guidelines provide for a new “principal consideration that analyzes whether a respondent has exercised undue influence over a customer,” a factor for adjudicators and FINRA staff to consider in determining appropriate sanctions. For additional information on this issue, please see the Law360 article written by Bruce Bettigole and Sarah Razaq Salis available here.

In addition, the SEC has approved the adoption of FINRA Rule 2165 and related amendments to FINRA Rule 4512 to tackle the increasingly high-profile issue of the financial exploitation of seniors and other at-risk individuals. In an article for Corporate
Secretary, Clifford Kirsch and Sarah Razaq Sallis outline practical steps firms may want to consider as they prepare for their implementation of Rule 4512.

FINRA Addresses Private Securities Transactions/Outside Business Activities

FINRA has recently targeted representatives’ private securities transactions (PSTs) and outside business activities (OBAs) for heightened scrutiny. Firms should take heed and ensure their related policies and procedures are adequate and enforced.

A FINRA hearing panel barred a registered representative for participating in PSTs, engaging in undisclosed OBAs, and making misrepresentations to his firm in compliance questionnaires. The panel found that the representative sold $100 million in investments through his private business without disclosing the OBAs to his firm. The representative claimed the failure to disclose was inadvertent, while the panel determined it was intentional. The panel supported its decision on the fact that the firm’s compliance department and the representative’s supervisor conducted annual inspections of his office, reviewed his annual attestations indicating that he had no OBAs, and provided training regarding what constitutes OBAs.

A significant takeaway from the decision is how thorough the firm’s policies and procedures were in attempting to identify the outside business activities of representatives. If firms implemented the best practices exhibited by the firm in this case, they could better position themselves to survive scrutiny from FINRA regarding PSTs and OBAs.

In a News Release, FINRA sought comments from firms regarding the effectiveness of rules regarding PSTs and OBAs and the challenges of compliance with those rules. Depending on the responses FINRA receives, it may issue a Regulatory Notice providing additional guidance or possibly even comments for a request to amend the rules.

FINRA Targets High-Risk Brokers

FINRA published a News Release regarding its efforts to strengthen the rules on so-called “high-risk” brokers. The proposals are intended to strengthen protections for investors and provide heightened supervision of certain brokers. Specifically, the proposals would expand the Sanction Guidelines if an individual’s disciplinary history includes specific types of past misconduct, would provide hearing panels with the ability to restrict activities of firms while a disciplinary matter is on appeal, and would require a mandatory disclosure on BrokerCheck if a firm is required to record all telephone calls with customers because of the percentage of representatives from previously disciplined firms. FINRA has indicated that it plans to issue a Regulatory Notice seeking comments.
FCA Chief Executive Speaks on Future of LIBOR

On July 27, 2017, the Financial Conduct Authority (FCA) published a speech by Andrew Bailey, FCA Chief Executive, on the future of the London Interbank Offered Rate (LIBOR) benchmark.

Points of interest in Mr. Bailey’s speech include:

- The FCA has regulated LIBOR since April 2013. Significant improvements have been made to LIBOR by its administrator, ICE Benchmark Administration (IBA), and the work of the 20 panel banks that submit contributions to it. One of the aims of the reform process has been to try to anchor LIBOR submissions and rates to the greatest extent possible to actual transactions. This change has been difficult to achieve because the underlying market that LIBOR seeks to measure (that is, the market for unsecured wholesale term lending to banks) is no longer sufficiently active. LIBOR is sustained by the use of “expert judgment” by the panel banks to form many of their submissions.

- In June 2017, the FCA launched an exercise to gather market data from 49 banks to determine the most active “actual and potential” participants in unsecured wholesale bank borrowing and related markets. The exercise is not yet complete, but data from IBA and central banks indicates that activity in these markets is limited, and there seems little prospect of them becoming substantially more active in the near future.

- The FCA considers that it is not only potentially unsustainable, but also undesirable, for market participants to rely indefinitely on reference rates that do not have active underlying markets to support them. Also, the FCA does not believe that it is appropriate to ask, or to require, panel banks to continue to submit expert judgments indefinitely. The powers available under the Benchmarks Regulation (Regulation (EU) 2016/1011) (BMR) do not in fact allow the FCA to compel submissions to LIBOR indefinitely.

- Transition work is of central importance to reducing the risks from financial markets’ current dependence on LIBOR. However, this work is unlikely to begin in earnest if market participants continue to assume that LIBOR will last indefinitely. In recent months, the FCA has had extensive discussions with the panel banks that currently both sustain and rely on LIBOR, as well as central banks and regulatory authorities in other jurisdictions, about the length of time required for an orderly transition away from the current widespread use of LIBOR. The consensus is that this transition will be challenging, but could probably be achieved within four or five years. A shorter period could significantly increase costs, risks and disruption.

- The FCA has therefore spoken with the panel banks about voluntarily agreeing to sustain LIBOR until the end of 2021. The intention is that, at the end of this period, it would no longer be necessary for the FCA, through its influence or legal powers, to persuade, or compel, banks to submit to LIBOR.

- There has been wide support from the panel banks for sustaining LIBOR for this period, although discussions about exactly how such an arrangement would be structured are ongoing. The FCA has asked for voluntary support from the whole panel. If this support can be converted into an agreement, this will increase the time in which an orderly transition can be planned and executed, when compared with a compulsion scenario.

- By having a date by which the transition will need to be complete, market participants now have a planning schedule, which should make it easier for them to engage with as many
counterparties and LIBOR users as is practicably possible. Market participants must take responsibility for their individual transition plans, but the FCA and other authorities will be ready to assist and support efforts to coordinate that work.

- Key questions are what will happen to LIBOR after the end of 2021, and to legacy contracts that still reference LIBOR at that date. In relation to the latter question, it will be necessary to consider whether the better approach to transition would be to amend contracts to reference an alternative rate, or amend the definition of LIBOR through the fallback protocol to replace the current methodology with alternative reference rates.

A link to Mr. Bailey’s speech is provided here.

Two Individuals Charged with Insider Dealing after FCA and NCA Investigation

On June 16, 2017, the FCA published a press release announcing that two individuals have been charged with insider dealing.

In the press release, the FCA states that it has instituted criminal proceedings against two individuals (one of whom is a former compliance officer employed by UBS AG’s London branch), following a joint investigation with the National Crime Agency (NCA).

Both individuals have been charged with five counts of insider dealing contrary to sections 52(2)(b) and 52(1) of the Criminal Justice Act 1993 (CJA). The alleged insider dealing took place between June 3, 2013, and June 19, 2014.

A link to the FCA’s press release is provided here.

Court of Appeal Finds Duty of Care Did Not Arise in Relation to Banks’ Conduct of Reviews of IRHP Sales and Dismisses Three Linked Appeals

In CGL Group Ltd. and others v. The Royal Bank of Scotland plc & National Westminster Bank plc and others [2017], EWCA Civ 1073, the Court of Appeal dismissed three linked appeals, finding that a duty of care did not arise in relation to the reviews conducted by the respondent banks regarding the interest rate hedging products (IRHPs) that they had sold to the appellants.

In reaching this conclusion, the court considered a number of factors, including the nature of the IRHP Review process agreed to between certain banks and the FCA, the role of the independent reviewer under the IRHP Review, and the overall statutory regime.

A link to the judgment is provided here.

ECB Sets Out Approach to Implementing FX Global Code

On July 26, 2017, the European Central Bank (ECB) published a press release setting out its approach to implementing the FX global code.

The FX global code comprises a set of global principles of good practice in the foreign exchange (FX) market. It was launched in May 2017 by the Global Foreign Exchange Committee (GFXC), which is responsible for maintaining and updating it.

The ECB’s approach is to:
- Invite foreign exchange trading counterparties to publicly commit to the principles set out in the FX global code by endorsing the statement of commitment annexed to the code by the end of May 2018.
- Encourage counterparties to reaffirm their commitment to these principles after any substantial future update of the FX global code.

The ECB also reaffirms its own intention to commit to the FX global code when participating in the FX market. Membership of the ECB’s foreign exchange contract group (FXCG) will now be contingent on adherence to the principles set out in the code, and FXCG members will be required to demonstrate their institutions’ commitment to it. The FXCG’s terms of reference have been updated to reflect these requirements.

A link to the ECB’s press release is provided here.

ESMA Chair Speaks on Preparing for MiFID II

On June 7, 2017, the European Securities and Markets Authority (ESMA) published a speech by Steven Maijoor, ESMA Chair, on, among other things, preparation for the implementation of the Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (Regulation 600/2014) (MiFIR).

Mr. Maijoor summarized some of the work undertaken by ESMA relating to the implementation of MiFID II and further stated:
- ESMA is currently working on opinions on pre-trade transparency waivers for equity instruments, and will soon start working on ESMA opinions on position limits and waivers for non-equity instruments. It expects to handle about 1,000 individual waiver notifications and about 100 notifications on position limits.
- ESMA has made significant progress over the last months with the implementation of its IT projects, which will be crucial for the successful implementation of MiFID II. In particular, Mr. Maijoor refers to the financial instruments reference data system (comprising the collection of reference and trading data and transparency calculations) and the double volume cap mechanism.
- ESMA intends to publish the transitional calculations for non-equity instruments specifying the large in scale and size specific to the financial instrument thresholds for all instruments, and the liquidity status of all instruments except bonds, at the beginning of July. The publication of the transitional calculations on the liquidity status of bonds is scheduled for the end of November and the beginning of December, as well as the transitional calculations for most equity instruments.
- ESMA is currently finalizing a consultation paper on the trading obligation for derivatives. It expects to publish this paper in the coming weeks and intends to deliver the draft regulatory technical standards to the European Commission in early autumn.
The transposition date for MiFID II is January 3, 2018.

In his speech, Mr Maijoor also refers to ESMA’s response to the European Commission’s review of the European Supervisory Authorities (that is, (1) ESMA, (2) the European Insurance and Occupational Pensions Authority (EIOPA) and (3) the European Banking Authority (EBA)), which was published on May 30, 2017) and ESMA’s opinion setting out general principles to support supervisory convergence in the context of the UK withdrawing from the EU, which was published on May 31, 2017.

A link to Mr. Maijoor’s speech is provided here.

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SFC Signs MOU with FCA on Enhanced Supervision of Cross-Border Regulated Entities

The Securities and Futures Commission (SFC) has entered into a memorandum of understanding (MOU) with the UK Financial Conduct Authority (FCA) providing for consultation, cooperation and exchange of information in connection with the supervision and oversight of regulated entities that operate on a cross-border basis in Hong Kong and the United Kingdom.

The MOU, which covers financial market participants and other entities that are regulated by the SFC or the FCA, enables the SFC and the FCA to cooperate with each other in the interest of fulfilling their respective regulatory mandates.

The MOU, which came into effect on July 7, 2017, can be accessed here.

SFC Concludes Consultation and Further Consults on Changes to Financial Resources Rules

The SFC has published consultation conclusions on the proposed regulatory capital regime for licensed corporations engaged in over-the-counter derivatives activities and other proposed changes to the Securities and Futures (Financial Resources) Rules (FRR).

After considering the comments received, the SFC has decided to implement the previously proposed regime subject to certain modifications, which include reducing the minimum capital requirements for fund managers’ central dealing desks which meet certain conditions and extending the transitional period for full compliance with the new FRR requirements from six months to one year.

The SFC will also introduce into the FRR an internal models approach benchmarking to the latest standards set by the Basel Committee on Banking Supervision.

To reflect recent market developments, the SFC seeks to further consult on a number of modified and additional FRR proposals in due course.

For more information, please click here.

SFC Identifies Irregularities in Private Funds and Discretionary Accounts

The SFC has issued a circular expressing its concerns about the management of some private funds and discretionary accounts. In particular, during the SFC’s supervision of licensed corporations engaged in the asset management business, a number of private funds and discretionary accounts with concentrated, illiquid and interconnected investments were found to have irregular features.

Among the irregularities cited in the circular, discretionary account holders held sizable concentrated stock positions in their accounts and asset managers acted solely at the direction of their clients without exercising investment discretion. Additionally, some cases were found to involve related-party acquisition or disposal of listed company shares by bought and sold notes.

The SFC also identified instances where fund investors or discretionary account holders were substantial shareholders, directors or affiliates of the listed companies invested by the funds or the discretionary accounts. In one case, a director of an asset manager was also a director or chief executive officer of listed companies in which funds under the management of the asset manager were invested.
The nature and commercial substance of the practices highlighted in the circular are questionable and may conceal shareholdings in listed companies. In addition, the SFC warned that undue concentration of illiquid or interconnected stocks may have a material adverse effect on the ability to meet investors’ redemption requests.

The SFC’s circular should be treated as a warning to asset managers that the SFC is prepared to take enforcement action against asset managers should infringements of the kind outlined in the circular are identified. This circular also highlighted that possible enforcement action of this nature would not be limited to asset managers themselves but may also extend to the board and senior managers (including Managers-in-Charge of core functions) of such asset managers.

SFC Censures China Life Insurance (Overseas) Company Limited for Breaches of the Takeover Code

The SFC has publicly censured China Life Insurance (Overseas) Company Limited (China Life) as a result of its failure to disclose its dealings in the shares of Glorious Property Holdings Limited (Glorious Property) in contravention of the Code on Takeovers and Mergers (Takeover Code).

Between May 9 and August 5, 2016, China Life executed 2,139 trades in Glorious Property’s shares during an offer period and failed to make public disclosures of these dealings as required by Rule 22 of the Takeover Code. During this time, China Life held more than 5% of Glorious Property’s issued shares and was therefore an associate of the company.

China Life accepted that it failed to comply with the Takeover Code and consented to the disciplinary action taken against it. It is implementing a number of remedial measures to ensure future compliance with the Takeover Code.

For more information, please click [here].

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MAS Issues Prohibition Orders Against Prem Hirubalan for Unauthorized Share Trading and Misappropriation of Customer Funds

Prem Hirubalan was a representative of OCBC Securities Private Limited from May 2010 to May 2011. During that time, he conducted unauthorized share trades in the trading accounts of three customers and misappropriated about S$81,000 from one of these customers. On June 24, 2016, he was convicted for these offenses under Section 201(b) of the Securities and Futures Act (Cap 289) (SFA) and Section 406 of the Penal Code (Cap 224), and sentenced to 10 months’ imprisonment.

On August 17, 2017, the Monetary Authority of Singapore (MAS) followed up with two Prohibition Orders against Mr. Hirubalan for a period of seven years. Mr. Hirubalan is prohibited from:

i. performing any regulated activity, and taking part in the management of, acting as a director of, or becoming a substantial shareholder of any capital market services firm (issued under Section 101A of the SFA); and

ii. providing any financial advisory services, and taking part in the management, acting as a director or becoming a substantial shareholder of any financial advisory firm (issued under Section 59 of the Financial Advisers Act (Cap 110)).

The Assistant Managing Director (Capital Markets), MAS, issued the following statement about the Prohibition Orders:

MAS expects all finance professionals to act honestly and with integrity. To protect consumers from fraudulent and dishonest behaviour by representatives, MAS will not hesitate to bar any individuals who do not meet fit and proper criteria from the financial industry.

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DFSA Fines Individual for Providing False Information

The Dubai Financial Services Authority (DFSA) has recently taken enforcement action against Chetan Parmar, a former employee of a major global bank.

The DFSA found that, in July 2012 and April 2013, Mr. Parmar misled the DFSA and provided it with false information regarding his employer’s private wealth management activities.

The DFSA imposed a fine of US$25,000 (AED 91,750) on Mr. Parmar for his misconduct. The action taken against Mr. Parmar is final; he has not referred the DFSA’s decision to the Financial Markets Tribunal for review.

The official announcement can be accessed here.

New UAE Takeover Regime

The UAE’s Securities and Commodities Authority (SCA) has recently issued new rules that will introduce a seminal takeover regime in the UAE. Resolution No (18/RM) of 2017 introduces a new codified regime for implementing tender offers, which will have a significant impact on mergers and acquisitions for public shareholding companies. Any public joint stock companies listed in the Financial Market or Stock Exchange will fall under this scope; however, government entities, “strategic partners” and restructuring companies in financial difficulty will remain exempt.

SCA Introduces Controls over Private Equity Funds

The recent decision of the SCA looks to regulate controls over private equity funds and marks a decision in a wider set of fund regulations implemented in order to replace the 2012 regulations which were intended to have a similar effect. The Administrative Decision No. (2/R.T) of 2017 adds to the growing set of fund regulations which aim to contribute to the growth of the UAE by catalyzing investment structures through improved efficiency.

The regulations impose obligations for incorporation agreements, including details of the fund size and investments, as well as borrowing limits. More importantly, Article 3 of the decision provides how such a fund shall invest most of its assets, including buying shares in limited liability companies, partnerships or private shareholding companies and buying securities of public shareholding companies that have begun to convert to private companies. Article 4 also details general partner obligations including fund asset assessment, management and evaluation as well as to assume full responsibility for the management of fund assets and insure assets against risks.
DFSA Signs MOU with European Securities and Markets Authority (ESMA)

The DFSA has recently signed a Memorandum of Understanding (MOU) with the European Securities and Markets Authority (ESMA) that agrees to information sharing and cooperation arrangements regarding the DIFC-based central counterparties’ (CCPs) compliance with conditions set out in the European Union’s Market Infrastructure Regulation (EMIR). This deal allows for CCPs based in DIFC to provide services to EU-based clearing members and trading venues. DFSA’s chief executive Ian Johnston has said that the signing will enable DFSA “to cooperate and exchange information in connection with monitoring of DIFC-based CCPs.”

Jordan Announces Security Law Implementation

Jordan’s Securities Commission has announced it has started work to ensure the Securities Law can be implemented. The Commission is issuing and updating its legislation to ensure it complies with the 2017 Securities Law, as well as drafting rules for public companies and other companies under the Commission’s control. This includes investor protection regulations as well as mutual fund regimes, similar to those recently implemented in the UAE.

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Robert Ophèle Appointed Chairman of the Autorité des Marchés Financiers, Replacing Gérard Rameix

Robert Ophèle was appointed Chairman of the AMF by Decree of the French President beginning August 1, 2017. The AMF Chairman, who also chairs the Board, was appointed by a presidential decree for a non-renewable irrevocable five-year term.

Mr. Ophèle (60), graduated from the ESSEC business school, joined the Banque de France in 1981 and spent three years in banking supervision before joining the Monetary Studies and Statistics Directorate as an economist, specializing in the interaction between financial market developments and monetary policy. Following a secondment to the Federal Reserve Bank of New York between 1990 and 1991, he returned to the Banque de France as Head of the Budget Division, and subsequently took up the position of Director of the Management Control and Budget Directorate. In this role, he represented the Banque de France on various Eurosystem committees.

Mr. Ophèle is a Chevalier of the French Legion of Honour.

To read his full profile on the AMF website, click here.

The AMF Fines an Asset Manager for Charging Redemption Fees

The AMF fined an asset manager €35 million for charging clients redemption fees that were not outlined. The charges were the result of a transfer of net redemption fees of the funds’ net assets to a debt account, which resulted in a decrease in the net asset value of these funds and inclusion in a NAM account.

The AMF sanction committee considered the “inaccurate and misleading information” given in some of the controlled fund prospectuses by the asset manager, indicating that the redemption fees were applied in half of the funds and were used to offset the costs of purchasing or selling assets.

As a consequence, the AMF sanction committee ruled that the fees charged by the asset manager were “undue and unjustified charges” totaling €15.6 million between 2012 and 2015.

The firm is expected to appeal the decision before the French Council of State, arguing that it acted in good faith and in the interests of its clients.

The AMF Publishes Lists of Unauthorized Agents

The Autorité des Marchés Financiers (AMF) has issued several public warnings by publishing lists of unauthorized agents. In particular, the AMF has warned investors about the activities of unauthorized websites offering binary options, for which no authorized investment services provider can be clearly identified.

The AMF reminds investors that they can ensure that the intermediary offering banking or financial products or services is authorized to operate in France by consulting the register of financial agents or the list of authorized intermediaries in the financial investment advisor (FIA) or participating investment advisor (PIA) categories.

The AMF is also targeting unauthorized diamond investment platforms, following an increase in proposals to invest in diamonds without complying with the Law of December 9, 2016 on transparency, the fight against corruption and the modernization
of economic life (Sapin II law). Pursuant to the new regulation, diamond investment proposals highlighting the possibility of a financial return or a similar economic effect are now subject to ex ante control by the AMF, since they involve intermediation in miscellaneous assets.

Consequently, no offer on diamond investments can be directly marketed in France without a prior registration number from the AMF. Platforms that do not apply or obtain such a registration number are listed as unauthorized platforms on the AMF website.

The AMF also warned the public against the activities of some platforms engaging in unauthorized investment services.

To see the list of unauthorized diamond investment platforms, click here. To see the list of unauthorized websites offering binary options, click here.

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Anti-Money Laundering Enforcement by the CBI on the Increase

Anti-money laundering (AML) related fines by the Central Bank of Ireland (CBI) are increasing in both size and frequency. In the past year, there have been three major fines imposed on Irish domestic banks for AML breaches. The cases are:

- In October 2016, one bank was reprimanded and fined €3,325,000 for significant failings identified in the firm’s AML/CFT framework and procedures with respect to outsourcing, risk assessment and customer due diligence. There was also non-compliance with respect to trade finance procedure manuals, adherence to internal procedures, training of non-executive directors and reliance on third parties with respect to customer due diligence.

- In April 2017, a second bank was reprimanded and fined €2,275,000 for significant failings in the reporting of suspicious transactions, determination of source of wealth and source of funds, customer due diligence, and policies and procedures.

- In May 2017, a third bank was reprimanded and fined €3,150,000 for significant weaknesses in the adequacy of the bank’s risk assessment, delays in reporting suspicious transactions and weaknesses in its customer due diligence controls.

The increase in fines follows the CBI’s creation of a dedicated AML Division (AMLD) in 2010, responsible for fulfilling the CBI’s function to monitor financial institutions’ compliance with regulatory obligations set out in the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. A review of AML compliance in the Irish banking sector by the AMLD showed that the banks need to work harder to effectively counter money laundering and terrorist financing. The AMLD identified a number of issues as causes for concern, including:

- Incomplete risk assessments that did not effectively consider relevant money laundering or terrorist financing risks;

- Non-adherence to firms’ own AML/counter terrorist financing policies;

- Failure to report suspicious transactions without delay; and,

- Shortcomings in customer due diligence processes, including the identification of politically exposed persons.
The CBI has emphasised the need for supervised firms to have a comprehensive and bespoke risk assessment. In a speech on June 9, 2017, Director of Enforcement at the CBI, Derville Rowland, said:

One of the Central Bank’s key expectations for an effective AML control framework is that it is based on a money laundering and terrorist financing risk assessment specific to the firm’s business and that it has robust controls in place to mitigate and manage the risks identified. We continue to stress to firms and the industry at large that a “tick box” or rules-based approach is not fit for purpose and will not meet regulatory expectations. We will not accept this approach from supervised firms.

A link to the full speech of Mr. Rowland can be found [here](#).

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ECB sanctions Banca Popolare di Vicenza

On September 15, 2017, the European Central Bank (ECB) announced that it was fining Banca Popolare di Vicenza, now in liquidation, €11.2 million for a number of violations perpetrated between 2014 and 2016.

The ECB detected the violations following supervisory activity conducted by its banking watchdog, the Single Supervisory Mechanism (SSM). The ECB stated that the level of the fine takes into specific consideration the “seriousness of the infringements committed, as well as the degree of responsibility of the credit institute.”

The €11.2 million fine was divided as follows:

- An €8.7 million fine was imposed on the bank for two violations of quarterly reporting requirements (the first in Q4 2014 and the second in Q1 2015) and, additionally, for breaches of annual public disclosure requirements, having provided the SSM with incorrect information in respect of the bank’s share capital; and
- A €2.5 million fine was imposed on the bank for violations of provisions regulating large exposure limits (covering the period December 4, 2015 to March 31, 2016).

Following the controversial agreement between the Italian Government and the European Commission—designed to avoid the application of the new bail-in regulation—the fine imposed by the ECB will become part of the debt of the “bad bank” set up during the liquidation procedure. However, given the ECB’s claim will be considered as a non-priority claim, there is likely a slim chance of the fine being fully paid.

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AFM Appeals Fines Imposed on Former Imtech Managers Quashed by Rotterdam Court

On April 24, 2017, the court in Rotterdam quashed fines of €600,000 and €500,000 that were imposed in 2015 by the Netherlands Authority for Financial Markets (Autoriteit Financiële Markten or AFM) on two former managers of Royal Imtech B.V. (Imtech).

According to the AFM, the former managers were culpable for not publishing price-sensitive information on time. The court ruled that the AFM should have proved that the price-sensitive information was actually sensitive. Therefore, the court ruled that there was no price-sensitive information that should be published by Imtech or the former managers of Imtech.

The AFM has lodged a further appeal against the judgment of the court.

The news item can be found [here](#).

AFM Fines Insurance Company

On May 19, 2017, the AFM imposed a fine of €100,000 on an insurance company, because it paid commission to an agent for intermediating in insurances. The insurance company therefore acted in breach of a commission prohibition.

The insurance company cooperated in a plan to work around the commission prohibition. The insurance company placed four employees of the agent on its payroll and paid salaries in an amount of €87,766. In addition, the insurance company bought the customer portfolio from the agent for €1.

The employees kept working from the office of the agent and were also managed by the agent. The insurance company also paid the agent €64,377. According to the AFM, this payment was, in fact, providing commission that was prohibited. The Dutch Central Bank (De Nederlandsche Bank) also revoked the license of the insurance company to conduct its business in funeral expenses and benefits-in-kind insurances.

The news item can be found [here](#) (only in Dutch).

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Cornerstones of New EU Regulation
From the beginning of January 2018, the amended Markets in Financial Instruments Directive (MiFID II) and its Regulation (MiFIR) together with the Delegated Acts, and the Regulatory and Implementing Technical Standards (collectively, MiFID) will be adopted in the EU.

A key aim of MiFID is enhancing investor protection as well as improving conduct of business and organizational standards. To achieve this goal, MiFID defines general behavior rules (i.e., acting honestly, fairly and professionally in accordance with the best interest of the client), minimum standards for client information, criteria for the assessment of suitability and appropriateness and client reporting, as well as best execution and client order handling standards (Article 24 to Article 30 MiFID). The Commission Delegated Directive sets out further details with regard to safeguarding financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (e.g., inducements, retrocessions, finder fees).

While MiFIR will apply directly to all financial institutions, MiFID II must be transposed into local law by all 28 EU member states as well as providers of MiFID services in the European Economic Area (EEA), including Norway, Iceland and Liechtenstein. Therefore, 31 different regulations will apply and must be complied with on a permanent basis in order for MiFID II services to be offered by third-country firms to private individuals or legal entities established or situated in the EU/EEA jurisdictions.

Switzerland and the “Equivalence Test”
Swiss financial institutions have market access rights in the EU member states to provide investment services and perform investment activities for eligible counterparties and for per se professional clients provided Swiss laws meet the “Equivalence Test.” Notably this requires that (i) Switzerland enacts appropriate business conduct rules in the form of legal and supervisory regulations, and (ii) the EU Commission adopts an “Equivalence Decision” in relation to the Swiss framework.

Currently, significant shortcomings exist on client protection under Swiss law. Swiss business conduct rules are only defined in regulatory requirements issued by the Swiss Financial Market Supervisory Authority (FINMA) and in self-regulatory requirements issued by the Swiss Bankers Association. A formal law issued by the Federal Parliament on, for example, client knowledge and experience tests and product suitability and appropriateness as well as other business conduct rules, is missing. Given the lack of a formal ruling, the Swiss legal framework may not yet meet the “Equivalence Test,” following the entry into force of MiFID and MiFIR in the EU. However, a new law currently in the legislative process shall close this gap.

At the beginning of November 2015, the Federal Council adopted the dispatch on the Financial Services Act (FinSA). The draft law passed the Council of States in December 2016, has been approved by the Economic Affairs and Taxation Committees of the National Council, and will be debated in the September 2017 session of the National Council. It is expected that this law will be enacted in the course of 2019, more than one year after MiFID and MiFIR have been adopted.
FinSA governs the relationship between financial intermediaries and their clients. It sets out minimal transparency standards for inducement without banning kickbacks and retrocessions. It introduces three client categories, each of them with a different client protection mechanism (i.e., suitability and appropriateness testing). Under the new law, banks must document their service and product offerings as well as their client correspondence in case of a negative suitability or appropriateness assessment. Most provisions have already been introduced over the last few years via FINMA-Circulars or self-regulatory standards, and therefore changes are more formal than material.

The prevailing legal opinion is that these business conduct rules will meet the “Equivalence Test” and therefore, the EU Commission will grant market access rights to Swiss banks for eligible counterparties and per se professional clients. Swiss banks soliciting opted-up professional or retail clients must, however, continue to rely on bilateral agreements negotiated between Switzerland and the EU member states.

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