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Regulatory Watch: Asset Management

2nd Quarter 2019

July 2019

SOMMAIRE

France

The Enforcement Committee at the AMF sanctions a company in a continuation plan for concealing its difficulties, as well as its managers (and their companies) for insider trading

April 23rd, 2019

In its decision of 17 April 2019, the Commission imposed penalties of €90,000, €250,000 and €180,000 respectively on a company, its former Chairman and CEO and its former Deputy Director General in charge of communication. It also sanctioned three companies related to the directors for €75,000, 225,000 and 10,000.

Deficient financial communication of an issuer under a continuation plan

The common feature of the information breaches retained by the Commission is that they concealed from the public the serious difficulties faced by a company specialising in women's fashion and now in receivership, at the time of the events.

The company waited until 27 April 2015 to provide the public with the information, privileged from 14 October 2014, relating to the non-payment of a due date for the continuation plan adopted in the context of its legal redress proceedings, which meant it failed to fulfil its obligation to provide any privileged information as soon as possible.

In addition, the company provided misleading information in its press releases of 29 December 2014 and 20 February 2015, suggesting that there were no difficulties in implementing the continuation plan and concealing the seriousness of its financial difficulties.

The Commission found that these breaches by the company were attributable to its managers.

Insider misconduct by executives and their companies

The Enforcement Committee also sanctioned the managers of the company and three linked companies for insider trading violations, which also fall within the context of the company's difficulties.

The Commission has thus concluded that, by selling the company's shares on behalf of the companies to which they were linked, the two managers had used the inside information they held in connection with their functions, relating to the non-payment of the due date of the continuation plan in October 2014 and/or the subsequent filing, on 23 February 2015, of a request for resolution of the continuation plan by the auditor on the execution of the plan.

Finally, the companies related to the directors failed to comply with their obligation to report to the AMF their transactions in the company shares, which was also attributed to the managers.

This decision is subject to appeal.

Professional certification: the Autorité des marchés financiers consults on amendments to its general regulations and on an instruction for a common review basis

April 8th, 2019

With a view to improving the quality of the AMF-certified examination, the regulator wishes to gather the opinions of all interested parties on a draft common examination database aimed at pooling the corpus of questions used by certified bodies and enriching the examination program.

The system for checking the minimum level of knowledge was introduced in July 2010. Regarding employees or future professionals of investment service providers (ISPs) performing certain key functions, it has been extended since 1 January 2017 to financial investment advisers (FIAs). The widely acclaimed AMF-certified examination is a clear recognition of a core of professional knowledge and reinforces the quality and consistency of the advice given to clients in France. At the end of December 2018, nearly 70,000 professionals had successfully passed it.

This system is based on the services of the AMF and the High Council for Market Certification (HCCP). At the end of 2017, the latter initiated a reflection on the creation of a common review base. After a year of consultation with the bodies whose examination is certified, this draft is submitted for consultation through amendments to the General Regulation.

The proposed changes concern in particular:

- A pooling of questions, with each organization now having a database of 600 different questions;
- An enhancement of the program in light of regulatory changes and the emergence of new themes (strengthening customer protection requirements, adding the theme of sustainable finance, etc.);
- Taking into account the specificities of the framework specific to ICFs.

In practice, two common test bases (in French and English) could come into force on 1 January 2020

The consultation is now closed.

Guide to fees and contributions due to the AMF

April 4th, 2019

This guide presents the new regime of fees and contributions due to the AMF by service providers, asset managers, as well as issuers and their shareholders, based in particular on the 2019 Finance Act, which simplified and streamlined this system. It also includes the practical arrangements for the payment of these fees and contributions.

The AMF publishes the summary of its thematic review of portfolio management practices

May 21st, 2019

The AMF has published the summary of two rounds of five "SPOT" (operational and thematic supervision of practices) inspections carried out as part of its Supervision#2022 strategy and targeting firms providing discretionary portfolio management services. These thematic inspections of investment service providers other than asset management firms focused on:

- The compliance of such discretionary mandates regarding: the purpose of the mandate, management objectives, authorised financial instruments, transmission of regular information to clients, withdrawals and liquidity risk, duration, modification and cancellation of mandates, conflicts of interest, complaints, mediation and confidentiality.
- The fees charged for providing portfolio management services: pricing policy, overall costs, entry fees, transaction fees, portfolio turnover ratios, conflicts of interest and information given to clients on costs and fees.

The AMF identified the following good practices:

- State clearly and explicitly in contractual documents or fee schedules that the cash reserve of the portfolios under management is excluded from the asset base for calculating custody fees;
- Make it easier for clients to access and understand information, particularly concerning management fees, from the moment the mandate is signed;
- Implement a pricing policy that allows the firm to generate most of their revenues from portfolio management fees

without an incentive to increase portfolio turnover in order to charge transaction fees;

- Identify any potential conflict of interest associated with unjustified portfolio turnover ratio (and consequently, generate additional transaction fees for clients) and implement frequent first and second-level checks of portfolio turnover ratios accordingly;
- Among the potential conflicts of interest, clearly identify those linked to the share of a group's own funds within clients' portfolios and manage such conflicts of interest by implementing an appropriate fund selection policy for the investment universe;
- Apply no entry fees for collective investment undertakings (CIUs) in which clients' portfolios investments are made;
- Exempt from custody fees investments made in a group's own investment funds.

However, poor practices were also noted, including the following examples:

- Disperse information relating to portfolio management services (particularly that relating to fees) in many separate documents.
- Fail to state explicitly the investment universe or allocations per asset class, including any thresholds that could be reached in exceptional market conditions.
- Fail to inform clients of the consequences of making frequent and/or large withdrawals from their portfolios.
- Within contractual documents or fee schedules, display quarterly rates for management fees exclusive of taxes, without providing information on the equivalent annual rates inclusive of taxes.
- When entry fees are charged by firms for investments in CIUs selected by the portfolio manager, fail to display in their fee schedule the rates of such fees applicable at the time investments in such CIUs are made.
- Fail to provide clients with explicit information regarding changes to the fees policy (for example, fail to inform clients that such fees have been changed and only making this information available on the firm's website).

Finally, the AMF reaffirms that the obligation to serve the clients' best interests entails not making them bear the cost of internal organizational decisions made by the service provider. It also reminds investment firms to must provide their clients with an illustration setting out the cumulative effect of costs on their returns on an ex-ante and ex-post basis, as well as with a periodic statement which shall include information pertaining to the total amount of fees and charges paid over the reporting period, itemizing at least total management fees and total costs associated with execution.

AMF annual report 2018

May 7th, 2019

The AMF published its press release presenting the 2018 annual report.

The annual report highlights the importance of the Brexit, particularly to help financial institutions to anticipate the consequences.

Robert Orphèle, President of the AMF indicated that the following points that need to be addressed at European level:

- Implementing a digital strategy for financial services
- Achieving the ambition for sustainable finance
- Revisiting the architecture of regulations on asset management
- Rendering the information to retail investors more efficient.

Furthermore, the AMF who had advocated its ambition to support the innovation, has largely nourished the drafting of the PACTE law. From now on:

- There is an optional visa for crypto-asset issuers and an optional authorization for digital asset service providers,
- Services for the custody and purchase/sale of crypto-assets against legal tender will be subject to mandatory registration under the rules against money laundering and the financing of terrorism
- Soliciting will be prohibited for all token issues as well as service providers that have not received approvals or licenses from the AMF
- The AMF could also request the blocking of fraudulent websites offering digital asset services.

Finally, the AMF who, as one of its 2018-2022 strategic plan priorities focuses on the responsible investments, indicates its interest to accompany the market participants. The AMF was focusing on the integration of environmental, social and governance factors into risk management, investment strategies, and client preference considerations.

In the framework of the PACTE law, the AMF is responsible for supervising the quality of information provided by the asset management companies on their sustainable finance strategy. Observations and recommendations on listed companies will be published by the AMF shortly.

Study on asset management companies' exercise of voting rights

May 2019

The Association Française de la Gestion Financière (AFG) has published a study on its findings of the asset management companies 2018 exercise of voting rights practices.

- This study highlighted the following points:
- The asset managers participation at the General Assembly meetings increased, including the meetings of foreign issuers
- The asset managers voted against one-fifth of the proposed resolutions
- The managers remain cautious about the measures that could weaken the rights and interests of their investors, and stress the lack of transparency regarding the allocation of remunerations
- The communication between the asset managers and the issuers are emphasized, however the communication with the foreign issuers should be improved

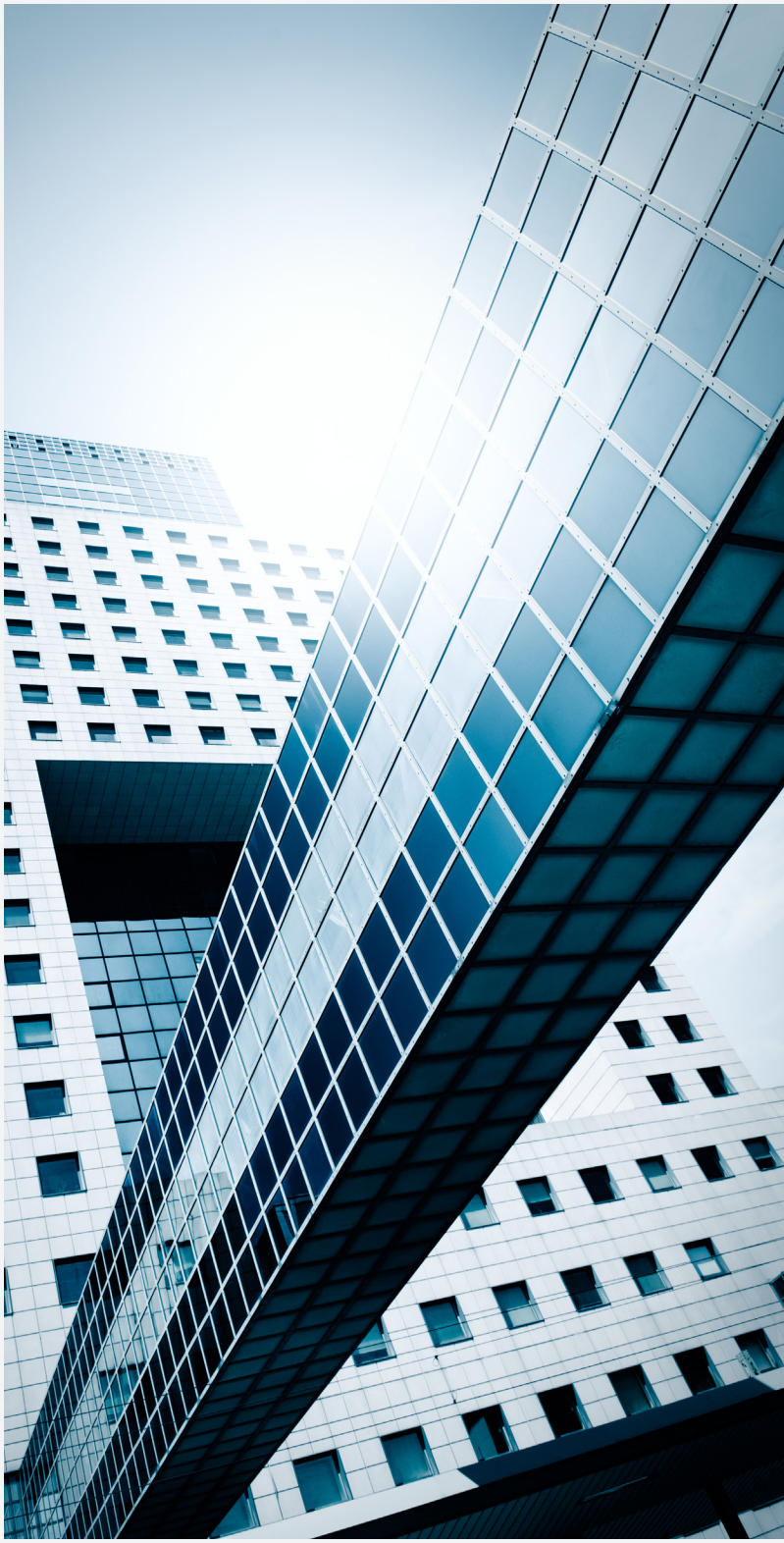
First proposals from the Autorité des marchés financiers for the new European legislature

June 6th, 2019

The AMF has proposed working suggestions to face the challenges of an attractive and competitive Europe along with digital and environmental transitions. Europe has also achieved many advances in strengthening the robustness of the capital markets of the 27-member states and has therefore developed its regulatory and supervisory framework. However, limits and more particularly political limits are becoming obstacles to the integration of the regulations and the possibility to further detail them. The French regulator has then presented the initial suggestions that will make Europe more efficient in terms of fulfilling the needs of investors and businesses that reinforce the attractiveness and competitiveness of Europe.

To achieve each goal, several suggestions are recommended:

- For a fit Europe that can face the future's challenges and strengthened on the international scene, the consolidation of European ambitions regarding sustainable finance to redirect financial flows is encouraged. Thus, the redirection of financial flows will support sectors like energy and will allow an environmental and social transition as well as a digital transition to further stabilise Europe's competitiveness.
- A revision of the regimes that govern Europe's relations with third party countries is proposed. These propositions should help meet the needs of the companies and should drive the Capital Market Union.
- More suggestions are made to help favour a better joined effort to supervise actors and develop a European framework that will monitor day-to-day business relationships between regulators, knowing that it will be profoundly transformed after the exit of the United Kingdom and the existence of several financial centres.
- The AMF made a series of concrete proposals that will



lead to an easier, simpler and more effective European rulebook. The main suggestions revolve around adjustments of the existing texts such as amendments to simplify them and make them easier to read and provide a correction when necessary. The asset management regulation is the principal target especially by the review of the AIFM Directive where the architecture of the regulation is being revised. These revisions should allow a more harmonised set of rules. Certain provisions of MiFID II are adjusted to take into account the effects of the exit of the European Union and the PRIIPs regulation is simplified for the understanding of the investors.

The regulator highlights the needs of a review of the reporting requirements to avoid duplication and inconsistencies.

More information on the AMF's page.

The AMF Enforcement Committee fines a financial investment advisor for failing to comply with its obligations within the framework of its RTO activity

June 13th, 2019

The AMF's Enforcement Committee has sanctioned a financial investment advisor €20,000 for breaching its professional obligations within the framework of its order reception and transmission (RTO) activity. However, the Committee found that objections pertaining to the provision of a non-guaranteed investment service and to the absence of a procedure for selecting the products and suppliers referenced on the company's platform were not characterized.

The Committee considered that the service provided by the company and consisting, on the one hand, in receiving subscription forms submitted by its members' clients for shares in collective investment undertakings and, on the other, transmitting these forms to the relevant investment management companies, did constitute an RTO activity. The AMF General Regulation makes the conduct of such an activity by an FIA conditional upon the. As the condition of prior conclusion of an agreement setting out the rights and obligations of each of the parties was not fulfilled, the Committee found that the company had breached its professional obligations.

Catalogue of French statutory and regulatory measures applicable to the marketing of shares or units in foreign UCITS in France

June 20th

The AMF has published its Catalogue of French statutory and regulatory measures applicable to the marketing of shares or units in foreign UCITS in France. The document sets out France's main provisions stemming from the Monetary and Financial Code, the General Regulation of the AMF, and the AMF's instructions, positions and recommendations applicable to the marketing in France of share or units of foreign UCITS

UCITS ETF: a unique European format

June 24th, 2019

The Association Française de la Gestion Financière (AFG) published a four-page brochure presenting the UCITS ETF : a unique European format.

The brochure presents the characteristics of the UCITS ETF funds under the harmonized framework of the UCITS Directive, the other Directives applicable to UCITS ETFs, as well as the strong listing requirements for UCITS ETFs and additional safeguards for retail investors.

UK

FCA sets out its priorities for 2019/2020

April 17th, 2019

The FCA published its Business Plan for 2019/20, outlining its key priorities for the coming year.

The immediate priority of the FCA will remain supporting an orderly transition after the UK leaves the European Union, however the FCA will also continue to play a leading role in shaping the global regulatory framework, by working with other national regulators and international bodies.

The Business Plan outlines four ongoing cross-sector priorities:

- Work on firms' culture and governance, including extending the Senior Managers and Certification Regime to all firms.
- Ensuring the fair treatment of firms' existing customers by monitoring firms' practices, including the information they give prospective and current customers.
- Developing the work being done on operational resilience, which will play a vital role in protecting the UK's financial system.
- Combating financial crime and improving anti-money laundering practices, by enhancing the use of technology and data, as well as engaging with multiple agencies and government bodies.

The plan also sets out three additional longer-term cross-sector priorities:

- The future of regulation and ensuring the regulatory landscape is fit for the challenge it faces.
- Ensuring innovation, together with advances in technology and data use, works in consumers' interests.
- Examining the intergenerational challenge in financial services, how the industry might respond and how regulation may need to change.

Alongside the Business Plan, the FCA is also publishing its annual Consultation Paper on fees and a paper setting out the FCA's Research Agenda.

FCA fines Bank £102.2 million for poor AML controls

April 9th, 2019

The FCA has issued its second largest financial penalty for Anti-Money Laundering (AML) control failings.

The FCA investigated two areas of the business which the Bank initially identified as being high risk. The business areas were the Wholesale Bank Correspondent Banking business and its branches in the United Arab Emirates (UAE). The FCA investigation identified serious shortcomings in the customer due diligence and ongoing monitoring. The Bank failed to maintain risk sensitive policies and did not ensure that the same AML and counter-terrorist financing controls were in place for all the UAE branches.

Under the Money Laundering Regulations 2007, the Bank was required to establish and maintain appropriate levels of risk sensitive policies to counteract and reduce the risk of any activities that may harm the institution, such as laundering money for the proceeds of crime, evading financial sanctions or financial terrorism.

The FCA found shortcomings in the Bank's internal assessments of the adequacy of its AML controls, identification and mitigation money laundering risks and escalation of risks.

Examples included:

- Opening an account with 3 million UAE Dirham in cash in a suitcase with little evidence that the origin of the funds had been investigated.
- Failing to collect sufficient information on a customer exporting a commercial product which could potentially have a military application. This product was exported to

over 75 countries, including two jurisdictions where armed conflict was taking place or was likely to be taking place.

- Not reviewing due diligence on a customer despite repeated red flags such as a blocked transaction from another bank, indicating a link to a sanctioned entity.

The periods of the failings in the Correspondent Banking business occurred between November 2010 to July 2013 and the failings from the UAE branches between November 2009 to December 2014.

The US authorities have also acted against the Bank due to the numerous violations of US sanction laws.

Mark Steward, Director of Enforcement and Market Oversight at the FCA, said that the breaches were particularly serious as they occurred against a backdrop of heightened awareness of AML risk following specific attention from the FCA, US agencies and other global bodies about such risks.

The full article can be read here.

Dear CEO letter – Wholesale Market Broking

April 18th, 2019

The FCA issued a letter on its website addressing the CEOs of all regulated broking firms in the wholesale markets sector. The purpose of the letter is to covey the FCA's views of the four key drivers of harm posed to clients and markets in this sector, as summarised below:

- Compensation and incentives
- Governance and culture
- Capacity of conflicts of interest
- Market abuse and financial crime controls

The letter calls on Senior Management of brokerage firms to

promptly consider how to address and mitigate the above issues identified. The FCA confirms that it will continue its focus in this area for the next 2 years. After March 2021, the FCA will publish an update on its views of the key risks firms in this sector pose, as well an updated supervisory strategy.

The FCA confirms that brokers need to prioritise raising their standards to embed a culture of good conduct. Simon Walls, Head of Wholesale Markets Department, says of wholesale brokers "…we continue to see a complacent attitude and resultant failure to meet expectations across all areas of regulation we have recently examined".

Firms are reminded to raise any questions with the FCA. In the case of urgent issues of strategic importance, firms can contact Simon Walls or Baljit Bhamra (Wholesale Brokers team manager) directly.

To read the letter in full, click here.

The future of financial conduct regulation

April 23rd, 2019

The Chief Executive of the FCA, Andrew Bailey, delivered a speech on the future of financial conduct regulation.

Mr. Bailey began his speech by reflecting on the FCA Mission statement which sets out the regulators approach towards meeting its statutory objectives. "Let me go back to 2017 when we published the FCA Mission statement, which continues to be the centrepiece, the glue, that holds together our approach to the large landscape of activity that the FCA covers to meet its statutory objectives. It shapes our culture too, for example we have re-done our statement of values in the light of The Mission. What we did with The Mission was to set out a much-needed framework to explain and interpret why we regulate conduct across the markets for finance"

Focus was given to the importance of regulating in the public interest framework and what that means. Mr. Bailey was in favour of a competitiveness objective supported by a cost benefit analysis alongside the FCA's competition objective. He said, "If we are going to have the competitiveness debate, let's please have it in a public interest framework that does not entrench the interests of incumbents".

In his concluding statements, Mr. Bailey distinguished the importance of principles and outcomes. "An organisation that prioritises being within the rules over doing the right thing, will not stand up to scrutiny for long. My aim is to see that mentality deeply embedded in the culture of firms. As the duty

of care debate shows, there are strongly held views on consumer harm, and its incidence. The post-Brexit system cannot and should not seek to deny or ignore them".

Full speech can be accessed here.

FCA confirms extension of the Temporary Permission Regime deadline

May 24th, 2019

The FCA confirmed the extension of the deadline for EEA firms passporting into the UK to notify the FCA that they wish to participate to the Transitional Permissions Regime ("TPR") to 30 October 2019. The extension will also apply to EEA investment funds marketing in the UK and the application deadline for Trade Repository and Credit Rating Agencies has also been extended to the same date. The TPR is instead closed for e-money firms but it is expected that this will reopen again under the relevant HM Treasury legislation on 31 July and close on 30 October 2019.

Nausicaa Delfas, Executive Director of International at the FCA, reminded firms of the importance of continuing planning for all scenarios, including the possibility of a no-deal Brexit at the end of October 2019.

The FCA will use its powers to issue transitional directions where possible. In areas where the FCA will not be providing transitional relief (such as MIFID II transaction reporting) the FCA reminded firms of its expectations that these should take reasonable steps to comply with the changes of legislation on exit day. The FCA also reminded firms that it does not intend to take a strict liability approach in case of failure to comply with the new requirements. However, firms should now use the additional time until end of October to prepare and, should they not meet the new obligations on exit day, be ready to provide evidence of why this happened.

The FCA also invited firms to continue monitoring its Brexit webpages where it will continue publishing relevant updates.

Two found guilty of insider dealing

June 27th, 2019

"F.A.M." and "W.C.", employed respectively as a senior compliance officer by an investment bank in London and as an experienced day trader of financial securities, were sentenced to an imprisonment of 3 years after being found guilty of insider dealing by the FCA. "F.A.M." had privileged access to sensible information through her position which covered investment banking which meant she had access to potential mergers & acquisitions data, whether they were ongoing or still pitched for by the investment bank.

"F.A.M." allowed her family friend "W.C." to make a profit of £1.4 million by identifying inside information and passing it to him using a pay-to-go phone. She gathered the information via the compliance system and disclosed it. "W.C." was able to trade the shares of the target companies to proposed takeovers including the shares of telecommunication group (June 2013). This information being disclosed to him before any public announcement he was able to profit from the trade before the market prices change and then close the positions after the announcement.

By the means of a trading address in Switzerland and a company incorporated in the British Virgin Islands, "W C" was able to trade by dealing in Contracts for Difference.

The reputation of the investment bank is affected because of the breach of trust this affair has brought. The crime is believed to be organised and calculated by the FCA and should therefore be punished in consequence.

More information on the FCA' page.

EUROPEAN UNION

EU Financial Regulators highlight risks of a no-deal Brexit and Asset price volatility

April 2nd, 2019

The latest report on "Risks and Vulnerabilities in the EU Financial System", published by the Joint Committee of the European Supervisory Authorities ("ESAs"), has shown that the EU's securities sector continues to face a range of risks, highlighting the following as potential sources of instability:

- Uncertainties around the terms of the UK's withdrawal from the EU.
- Further re-pricing of risk premia and asset price volatility, which could be aggravated by a less favourable macroeconomic environment and a no-deal Brexit scenario.

As a result of the ongoing uncertainties, supervisory vigilance and cooperation across all sectors remains crucial. Therefore, the ESA has called for European and national competent authorities ("NCAs"), as well as financial institutions, to put in place contingency plans and stress testing scenarios.

Contingency Plans: It is crucial that EU financial institutions, market participants and their counterparties enact timely contingency plans to prepare for the UK's withdrawal from the EU, including the possible market volatility that a no-deal Brexit may cause. The ESA has issued Opinions and Recommendations to provide important guidance for financial institutions, market participants and NCAs with regards to a potential no-deal scenario.

Stress Tests: With the potential for sudden risk premia reversals and a risk of rising funding costs, the development and regular use of stress tests across all sectors remains vital. ESMA will present guidelines on fund liquidity and Money Market Fund stress testing during 2019. ESMA is also preparing its next Central Counterparties ("CCPs") stress test.

The full article can be read here.

The European Securities and Markets Authority (ESMA) has today updated its Questions and Answers on data reporting under the Market in Financial Instruments Regulation (MiFIR)

The Q&As provide clarifications in relation to the requirements for submission of reference data under MiFIR. In particular, the Q&As relate to reporting obligations for trading venues operating on the basis of a specified list of instruments.

The Q&A on a defined list of instruments provides new answers on how operators of trading venue(s) should report instrument reference data in accordance with Article 2 of RTS 23 and related MAR RTS and ITS. The amendments to the existing Q&A on MiFIR data reporting becomes effective from 9 April 2019.

The purpose of this Q&A is to promote common supervisory approaches and practices in the application of MiFIR. It provides guidance to Investment Firms, Trading Venues, ARMs and Systematic Internalisers on compliance with the reporting provisions of MiFIR. ESMA will periodically review these Q&A and update them where required.

ESMA updates its Q&A on securitization regulation

May 27th, 2019

ESMA has updated its Q&A on the Securitisation Regulation (Regulation 2017/2402). The Q&A provides clarification on different aspects of the templates contained in ESMA's draft technical standards on disclosure requirements.

In the Q&A, a new section has been added relating ESMA's draft technical standards on notifications to ESMA of securitisations which meet the Simple Transparent and Standardised (STS) criteria. The newly added section 4 provides answers about the first date at which ESMA will receive an STS notification, information which will be available on ESMA's website regarding STS notifications, responsibility for information contained in an STS notification, and validation of information in an STS notification.

In addition, multiple general questions of relevance to the disclosure technical standards have been added to section 5.1.2.

ESMA updates Q&A on MiFID II and MiFIR investor protection and intermediaries

May 29th, 2019

ESMA has updated its Q&As on the implementation of investor protection topics under the Markets in Financial Instruments Directive and Regulation (MiFID II/MiFIR). The updated Q&As provide new answers on best execution and information on costs and charges.

The new Q&As concern the following subjects:

Best execution:

- Q21: Reporting for venues on the 'trading mode' according to RTS 27;
- Q22: Reporting for venues and firms on template fields of RTS 27 and 28 if the required content is not applicable to their activities;
- Q23: Reporting on 'passive' and 'aggressive' orders for firms using quote-driven systems to have client orders executed;
- Q24: RTS 28 reporting and execution venues.

Information on costs and charges:

- Q27: Ex-ante information in case of sell orders;
- Q28: Ex-ante information in case of telephone trading;
- Q29: Use of assumed investment amounts for ex-ante information in relation to investment services and/or products with non-linear charging structures;
- Q30: Use of ranges and maximum amount/percentages for ex-ante information.

ESMA updates MIFID II Q&As on transparency issues

June 3rd, 2019

The European Securities and Markets Authority (ESMA) has updated its Q&As related to transparency issues under the Market in Financial Instruments Directive (MiFID II) and Regulation (MiFIR).

ESMA reviewed obsolete Q&A and amended them to address transparency issues such as the reporting of a new ISIN in FIRDS and FITRS following a corporate action or pre-trade transparency waivers under MiFID I.

Two questions have been deleted concerning the shares admitted to trading on RM and the necessary adjustments made to data on MiFID I waivers as well as the MTF only shares, depositary receipts, certificates and more precisely how the double volume cap would be applied from January 2018 in relation to financial instruments which currently do not operate under a waiver. The compliance with the SI regime and notification to NCAs on the systematic internaliser regime.

ESMA publishes updated AIFMD and UCITS Q&As

June 4th, 2019

The European Securities and Markets Authority (ESMA) has updated Q&A documents on the application of the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive. These documents aim to promote common supervisory approaches and practices and implementing the measures regarding both the AIFMD and the UCITS Directive.

New questions have been added to the AIFMD and UCITS questionnaires concerning depositaries and the restrictions under which they are allowed to delegate the safekeeping of the assets, when they are allowed to entrust third parties to transfer assets and perform mere tasks.

The themes are also related to the performance of the depositary functions where there are branches located in other Member States or in case of delegation of depositary functions to another legal entity within the same group.

MIFID II: ESMA issues latest double volume cap data

June 7th, 2019

The European Securities and Markets Authority (ESMA) has updated its public register with the latest set of double volume cap (DVC) data under the Markets in Financial Instruments Directive (MiFID II). The DVC was introduced to limit dark trading allowed under the reference price waiver and the negotiated waiver for liquid instruments in an equity instrument.

DVC calculations and data are added to the previous updates and constitutes the latest update. 40 new breaches have been added with 31 equities for the 8% cap applicable to all trading venues, and 9 equities for the 4% cap, that applies to individual trading venues.

Any new instruments in breach of the DVC thresholds trading under waivers should be suspended from 13 June 2019 to 12 December 2019 and the instruments with existing caps from previous periods will keep being suspended. However, some trading venues that have submitted corrected data and have been proved to be wronged will have their waivers lifted.

275 instruments are suspended as of the 7th of June.

ESMA updates register of derivatives to be traded on-venue under MIFIR

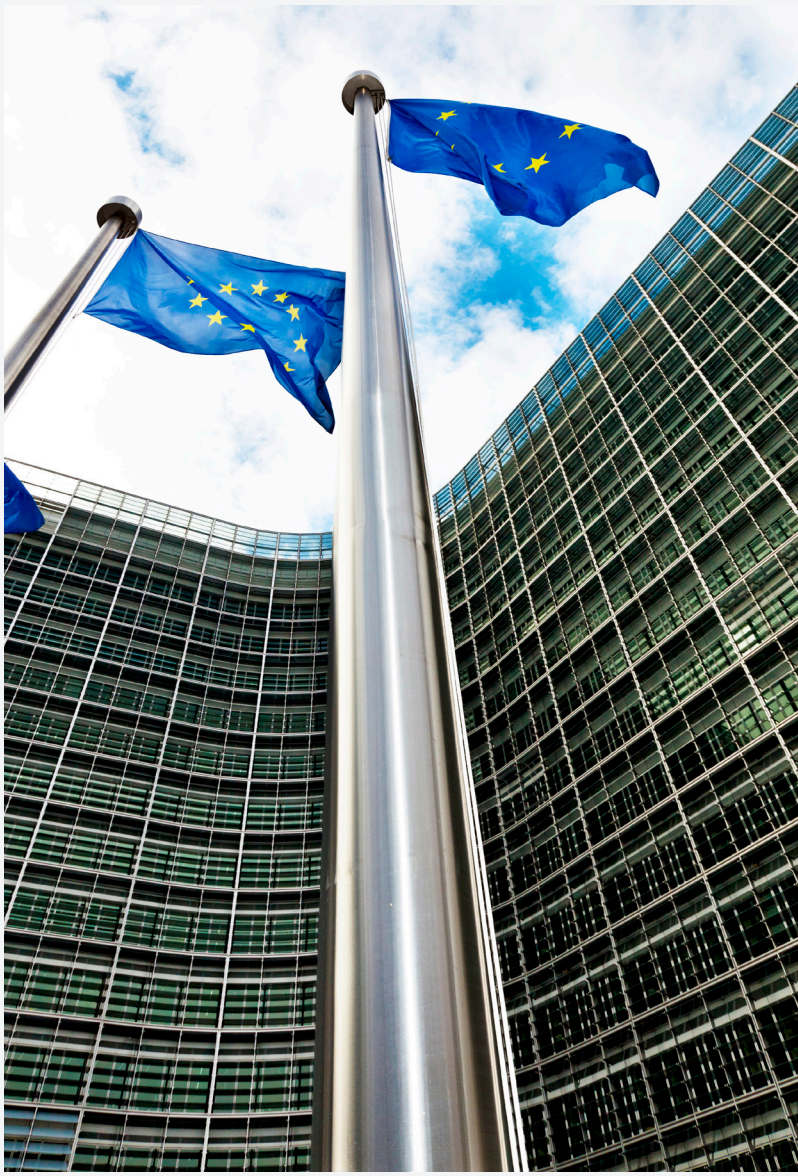
June 13th, 2019

The European Securities and Markets Authority (ESMA) has updated the public register for the Trading Obligation for derivatives under MiFIR.

The update consists of adding several UK venues where some of the classes of derivatives subject to the trading obligation are available for trading.

This allows a clarified register for the market participants on the application of the trading obligation under MIFIR:

- the classes of derivatives subject to the trading obligation
- the trading venues on which those derivatives can be traded
- the dates on which the obligation takes effect per category of counterparties.



ESMA updates Q&A on EMIR data reporting

June 14th, 2019

The European Securities and Markets Authority (ESMA) has updated its Q&A on practical questions concerning the European Markets Infrastructure Regulation (EMIR). The Q&A clarifies the implementation of EMIR refit with reference to:

- Q&A OTC 3 on the calculation framework towards the clearing thresholds; and
- TR Q&A 51 regarding the notifications to be made by market participants to their competent authorities to apply an intragroup exemption from reporting.

The topic concerning the procedure for non-financial counterparties (NFC) to notify that they exceed/cease to exceed the clearing threshold (Article 10 of EMIR) has been replaced by the procedure for financial counterparties and non-financial counterparties (FCs and NFCs) to notify that they exceed/cease to exceed the clearing thresholds (Articles 4a and 10 of EMIR). The calculation of the clearing threshold (Article 10 of EMIR) has also been replaced by the calculation of position for the clearing thresholds (Articles 4 and 10 of EMIR).

The responsibility of the FC and NFC (Article 11 of EMIR) has been amended, applicable from 17 June 2019. If a counterparty is not informed of its counterparties detailing its status, it will assume that the counterparty is above the clearing thresholds.

The clearing obligation (Article 4 of EMIR) has also been amended from specific trade novations to all types of novations.

The question concerning the start clearing date for Category 3 and 4 has been added and is applicable from the 17 June 2019. It clarifies when the FC+ in Category 3 need to start clearing and when and for which asset classes an NFC+ in Category 4 needs to start clearing.

OTC Derivatives Novations based question has been modified and limited to how should counterparties report OTC derivatives novations. In a similar manner, the population of the field Clearing obligation has been reduced to only how it should be populated for transactions executed on a regulated market and cleared trades.

Reporting obligation (Article 9(1) of EMIR) has also been added and indicates how the counterparties need to notify to the authorities their intention to apply the reporting exemption and its terms and conditions

USA

New SEC Campaign Educates Investors on Where and How to Get Answers

April 8th, 2019

The Securities and Exchange Commission today unveiled a public service campaign to empower Main Street investors to take control of their financial future. The public service announcement (PSA) encourages investors to use the free tools and unbiased information available on the SEC's online resource for investor education—Investor.gov—to get answers to their questions about investing.

"Main Street investors around the country have consistently told me two things: one, that they wish they were better informed about investing, and two, they wish they had started investing earlier. Asking the right questions of yourself and of those who provide financial services is key to getting started and staying on the right track," said SEC Chairman Jay Clayton. "Whether you're an experienced investor or new to the market, investor.gov can help you identify questions and find answers."

"This campaign is another way to maximize our education efforts to make investors aware of the information they need to make smart saving and investing decisions," said Lori Schock, Director of the SEC's Office of Investor Education and Advocacy. "Starting early and creating a financial plan is the best way to secure your financial future, and investor.gov is a great place to start."

The PSA highlights people from various walks of life asking questions about investing topics, such as planning for retirement, reading a 10-K, checking out the background of an investment professional, and understanding fees, IPOs, hedge funds, 529 plans, compound interest, and more.

It concludes with asking the question, "Where do I start?" encouraging investors to go to investor.gov to get answers to their most commonly asked questions. More than 12 million new users have accessed investor.gov since it launched in October 2009. The SEC expanded its outreach program in 2016 to include PSAs to reach and educate more investors.

Additional information on the PSA can be found here.

SEC Charges Real Estate Investment Group's Former Directors of Investment With Fraud

April 11th, 2019

The Securities and Exchange Commission today charged two former directors of investments at a real estate investment group for their roles in its massive Ponzi scheme. The defendants, California-based managers were separately arrested and charged by criminal authorities, along with the group's owner.

The SEC previously charged the group and the owner, and the group's highest-earning unregistered brokers. In January, a federal court in Florida ordered the group, related companies, and the owner together to pay $1 billion for operating this Ponzi scheme.

According to the SEC's complaint, although the managers were not registered in any capacity with the SEC, they were responsible for fraudulently raising at least $1.2 billion from more than 8,400 retail investors, many of them seniors, and together received more than $3 million in transaction-based and other compensation.

The complaint, filed in U.S. District Court for the Southern District of Florida, alleges that the first manager oversaw the group's fundraising for the group's securities from 2012 until his departure in 2015, when he was succeeded by the second manager. According to the complaint, the defendants were responsible for hiring and training the real estate investment group's sales force, approved fraudulent marketing materials and sales scripts, and helped create the false appearance that the group was a legitimate operation when in reality it was a Ponzi scheme that used money from new investors to pay existing investors.

"Instead of telling investors the truth – that the group's third-party lending business was a sham almost from inception – we allege that the managers worked diligently to perpetuate this sham by preparing and disseminating false marketing materials to induce more investments, keeping this massive Ponzi scheme afloat," said Eric I. Bustillo, Director of the SEC's Miami Regional Office. "The SEC is committed to continue to hold responsible parties accountable in this far-reaching scheme."

The SEC's complaint charges the managers with violating the securities registration, broker-dealer registration, and anti-fraud provisions of the federal securities laws, and seeks disgorgement of allegedly ill-gotten gains, with interest, and financial penalties.

The SEC's investigation, which is continuing, was conducted by Scott A. Lowry, Russell Koonin, Christine Nestor, and Mark Dee in the Miami Regional Office, with assistance from David Baddley, and supervised by Jason R. Berkowitz, Fernando Torres, Thierry Olivier Desmet, and Glenn Gordon. The litigation will be led by Ms. Nestor and Mr. Koonin under the supervision of Andrew O. Schiff. The SEC appreciates the assistance of the Florida Office of Financial Regulation, the U.S. Attorney's Office for the Southern District of Florida, the Miami field office of the Federal Bureau of Investigation, and the Internal Revenue Service, Criminal Investigations.

The SEC's Office of Investor Education and Advocacy has issued an Investor Alert to help seniors identify signs of investment fraud and, in conjunction with the Division of Enforcement's Retail Strategy Task Force, another Investor Alert about Ponzi schemes targeting seniors. The SEC strongly encourages investors to use the agency's Investor.gov website to check the backgrounds of people selling them investments to quickly identify whether they are registered professionals.

SEC Charges Investment Adviser with Fraud

May 28th, 2019

The Securities and Exchange Commission today charged investment adviser with defrauding clients by overcharging advisory fees of at least $367,000.

According to the SEC's order, the adviser owned and operated a now-defunct registered investment adviser company in North Carolina. The registered investment adviser primary revenue stream was customer advisory fees. Customer agreements provided that those fees would be based on each customer's assets under management. The SEC's order finds, however, that in 2015 and 2016, the adviser overcharged a majority of his clients. The amount and percentages of the overcharges varied but, in the aggregate, amounted to approximately 40% more than the agreed-upon maximum customer advisory fees. As described in the order, the adviser also misled his clients about the reason he transferred their assets from the asset management company's long-time asset custodian, falsely stating that it was his decision and that the separation was "amicable." In fact, as the order finds, the asset custodian ended the relationship with the asset management company after it noticed irregular billing practices and failed to receive sufficient supporting documentation from the adviser. Furthermore, the order finds that the adviser made material misstatements in reports filed with the Commission, including overstating the asset management company's assets under management by at least $34 million (18%) in 2015 and $61 million (35%) in 2016, and failed to implement required compliance policies and procedures. The order prohibits the adviser from acting in a supervisory or compliance capacity or from charging advisory fees without supervision for at least three years and requires the advisor to provide notice of the SEC order to clients and prospective clients.

"When advisors breach their duty to clients by misleading and overcharging them, they can expect the SEC will craft a package of remedies that will compensate harmed investors, provide additional safeguards for prospective investors, and deter similar conduct," said Carolyn M. Welshhans, Associate Director in SEC's Enforcement Division.

The SEC's order finds that the advisor violated Sections 206(2) and 207 of the Investment Advisers Act and aided and abetted and caused the asset management company's violations of the books and records and compliance provisions of the Advisers Act. In addition to the limitations and undertakings discussed above, the advisor agreed to a cease-and-desist order and a censure and agreed to pay disgorgement and prejudgment interest of $405,381 and a $100,000 penalty. Payments made by the advisor pursuant to the order will be distributed to harmed investors through a Fair Fund. The advisor consented to the order without admitting or denying the findings.

SEC Charges Nevada Man Who Traded on Confidential Information Taken from Lifelong Friend

May 7th, 2019

The Securities and Exchange Commission today announced settled insider trading charges against a Nevada man who obtained confidential information about a pending corporate merger from a lifelong friend and used it to generate more than $250,000 in illicit trading profits.

According to the SEC's complaint, while an individual was a guest in the home of a longtime friend who was also the general counsel of a corporation, the individual surreptitiously viewed documents contemplating an acquisition of a company by another one. Based on that information and without telling his friend, the individual then purchased target's stock in the brokerage accounts of his ex-wife and a former girlfriend and persuaded his father and another girlfriend to purchase the target's shares. The complaint further alleges that after the company and the target announced the merger on Aug. 16, 2016, the target's stock price jumped more than 17 percent, resulting in illicit profits from the individual's misconduct of more than $250,000.

"Those who illegally use confidential information to financially benefit others will be held liable for their misconduct," said Carolyn M. Welshhans, Associate Director of the SEC's Division of Enforcement. "The penalty in this action takes such improper trading profits into account."

The SEC's complaint, filed in U.S. District Court for the Southern District of Florida, alleges that the individual violated Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5. Without admitting or denying the allegations in the complaint, the individual has consented to the entry of a final judgment permanently enjoining him from violating the charged provisions of the federal securities laws and imposing a penalty of $252,995. The SEC also named as relief defendants the individual's ex-wife and a former girl-friend, who each profited when the individual used their

brokerage accounts to place illicit trades. The relief defendants consented to the entry of a final judgment agreeing to disgorge those profits with prejudgment interest. The settlement is subject to court approval.

SEC Awards $4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Action

May 24th, 2019

The Securities and Exchange Commission awarded more than $4.5 million to a whistleblower whose tip triggered the company to review the allegations as part of an internal investigation and subsequently report the whistleblower's allegations to the SEC and another agency.

The whistleblower sent an anonymous tip to the company alleging significant wrongdoing and submitted the same information to the SEC within 120 days of reporting it to the company. This information prompted the company to review the whistleblower's allegations of misconduct and led the company to report the allegations to the SEC and the other agency. As a result of the self-report by the company, the SEC opened its own investigation into the alleged misconduct. Ultimately, when the company completed its internal investigation, the results were reported to the SEC and the other agency. This is the first time a claimant is being awarded under this provision of the whistleblower rules, which was designed to incentivize internal reporting by whistleblowers who also report to the SEC within 120 days.

"In this case, the whistleblower was credited with the results of the company's internal investigation, which were reported to the SEC by the company and led to the Commission's resulting enforcement action and the related action," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "The whistleblower gets credit for the company's internal investigation because the allegations were reported to the Commission within 120 days of the report to the company."

The SEC has now awarded approximately $381 million to 62 individuals since issuing its first award in 2012. All payments are made from an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed $1 million.

On Feb. 21, 2018, the U.S. Supreme Court issued an opinion in a trust stating that the Dodd-Frank anti-retaliation provisions only extend to those persons who provide information relating to a violation of the securities laws to the SEC. The SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity as required by the Dodd-Frank Act.

Hedge Fund Adviser to Pay $5 Million for Compliance Failures Related to Valuation of Fund Assets

June 4th, 2019

The Securities and Exchange Commission has announced that a private fund manager in the mortgage-backed securities space has agreed to pay a $5 million penalty to settle charges caused by compliance deficiencies. The fund manager's chief investment officer agreed to pay $250,000 penalty. These deficiencies have contributed to the firm's failure and the penalty payment should ensure that certain securities in its flagship fund were valued properly.

The Colorado-based investment adviser company in connection with its flagship STS Partners' fund, ranked as one of the most consistent performing hedge funds in the country, failed to address the risk of traders under valuating securities and

selling for profit when needed with the right policies and procedures. The firm also failed to prevent the traders from providing inaccurate information to a pricing vendor and then using the price valued. The valuation of certain assets flagged as "undervalued" with notations to "markup gradually" in the flagship fund was overseen and approved by CIO and a committee comprised with his relatives and others without relevant expertise.

The compliance failures of the firm allowed the traders to mark assets up gradually instead of marking them to the market.

Without any admission of the management company, the firm consented to a censure and to cease and desist from committing any violations and future violations of a provision of the Investment Advisers Act.

Marshall Gandy Named Co-Head of SEC's Investment Adviser/Investment Company Examination Program

June 4th, 2019

Marshall Gandy has been named Co-National Associate Director of the Investment Adviser/Investment Company examination program in the Office of Compliance Inspections and Examinations (OCIE) by the Securities and Exchange Commission.

Jointly with Kristin Snyder, who has led the program since Aug. 10, 2016 and is the OCIE's Deputy Director since July 25, 2018, Mr. Gandy will oversee more than 630 lawyers, accountants and examiners responsible for inspections of SEC-registered investment advisers and investment companies.

Mr. Gandy has joined the SEC in 1999 and spent eight years as a trial counsel and enforcement attorney in the Fort Worth office's enforcement program before taking the role of Senior Regional Counsel at FINRA's Dallas District Office. He also held the roles of Presiding Judge and Assistant District Attorney in Dallas County before joining the SEC.

Marshall Gandy, believed to bring additional strong leadership to the national IA/IC, received his law degree from Southern Methodist University and his bachelor's degree from Sam Houston State University.

SEC Updates List of Firms Using Inaccurate Information to Solicit Investors

June 10th, 2019

The Securities and Exchange Commission updated its list of unregistered entities that use misleading information to solicit primarily non-U.S. investors, adding 22 soliciting entities, four impersonators of genuine firms and nine bogus regulators. These latest additions provided inaccurate information about their affiliation, location or registration. Firms that solicit investors are required to register with the SEC and meet minimum financial standards and disclosure, reporting and recordkeeping requirements.

The entities listed have been subject of investor complaints known as the Public Alert: Unregistered Soliciting Entities (PAUSE) list. It enables investors to better inform themselves and avoid being a victim of fraud.

Investors are better able to evaluate solicitations to buy and sell securities and avoid being a victim of fraud with the PAUSE list. The list also flags the registered securities firms and bogus "regulators" who falsely claim to be government agencies or affiliates. However, the inclusion on the list does not mean that the SEC has found violations of U.S. federal securities laws. Periodical updates of the PAUSE list are made by the SEC's Office of Market Intelligence in coordination with the Office of Investor Education and Advocacy and the Office of International Affairs.

How to protect yourself:

- Be aware that fraudsters may impersonate government agencies to lure investors into scams, including advance fee fraud schemes.
- Impersonators may falsely claim to be affiliated with the SEC (or another federal government agency) in an attempt to steal your personal information or your money. Federal government agencies, including the SEC, do not endorse or sponsor any securities, issuers, products, services, professional credentials, firms, or individuals.
- Investor Alert: SEC Impersonators Pretend to Help Investors Buy Stock.
- Visit Investor.gov for tips on investing wisely and avoiding fraud.

A bank Settles SEC Charges for Adding Undisclosed Markups on Client Expenses

June 27th, 2019

The Securities and Exchange Commission has announced that a bank has agreed to pay over $88 million to settle charges for overcharging mutual funds and other registered investment company clients for expenses related to the firm's custody of client assets. A secret markup had been included in the overcharges that the bank tacked on to the cost of sending secured financial messages through the Society of Worldwide Interbank Financial Telecommunication (SWIFT) network.

In the orders, the bank's clients agreed to pay the firm back for out-of-pocket custodial expenses that the firm paid on the client's behalf. However, the SEC finds that the bank routinely overbilled its clients. From 1998 to 2015, $170 million have been collected from the overcharges by the bank with $110 million coming from the hidden SWIFT markup charged to thousands of clients. Subsequently, the bank has been reimbursing its clients with interests.

The bank has violated Section 34(b) of the Investment Company Act of 1940 and caused violations of Section 31(a) of the Investment Company Act and Rules 31a-1(a) and 31a-1(b) according to the SEC. Without any admission of the bank, the firm agreed to cease and desist from committing any future violations of these provisions, to pay disgorgement and prejudgment interest of $48.78 million paid directly to the affected companies and to pay a civil penalty of $40 million.

The bank self-reported its conduct to the Commission and provided substantial cooperation to the Commission staff during the investigation.

DUFF & PHELPS

Protect, Restore and Maximize Value

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About Duff & Phelps

Duff & Phelps is the global advisor that protects, restores and maximizes value for clients in the areas of valuation, corporate finance, investigations, disputes, cyber security, compliance and regulatory matters, and other governance-related issues. We work with clients across diverse sectors, mitigating risk to assets, operations and people. With Kroll, a division of Duff & Phelps since 2018, our firm has nearly 3,500 professionals in 28 countries around the world. For more information, visit www.duffandphelps.com.