Commentaries

Bridging the Week by Gary DeWaal: July 18 - 22 and July 25, 2016 (New Clearing Member Category; Above the Law; MF Global; FX Trading Front Running; Deliveries; EFRPs)

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CME Group proposed a new clearing membership category to help customers avoid the risk of receiving a pro rata allocation of losses from their carrying futures commission merchant in the circumstance of the FCM's insolvency and its inability to satisfy its obligations to all its customers in full. In addition, the Financial Industry Regulatory Authority warned its members not to take advantage of recent federal appellate court decisions that it claimed were incorrect in permitting member firms to bar customers and associated persons from taking advantage of FINRA arbitration forums to resolve disputes. Finally, two former senior officers of a global investment bank responsible for certain of its foreign exchange trading were named in a criminal complaint filed in a federal court located in Brooklyn, NY, related to their purported front running of the foreign exchange trades of a customer. As a result, the following matters are covered in this week's edition of *Bridging the Week*:

- CME Group Proposes New Clearing Member Category to Help Customers Avoid Pro Rata Distribution Risk in Case of FCM Insolvency (includes **My View**);
- FINRA to Federal Courts: Our Rules Trump Your Decisions (includes **My View**);
- MF Global and Individual Defendants Finalize Settlement With Customers and Other Creditors;
- Global Head of FX Cash-Trading Desk of Global Investment Bank Arrested for Front Running (includes **Legal Weeds**);
- CME Group Sanctions Market Participants for Mishandling a Delivery, a Non-Bona Fide EFRP, a Transitory EFRP and Disruptive Trading (includes **Compliance Weeds**);
- CFTC Staff Suggest Measures by Clearinghouses to Enhance Recovery and Wind-Down Plans;
- UK FCA Recognizes Value of Dark Pools but Urges More Public Details Regarding Operations and Conflicts of Interest; and more.

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Article Version:

Briefly:

- **CME Group Proposes New Clearing Member Category to Help Customers Avoid Pro Rata Distribution Risk in Case of FCM Insolvency**: CME Group filed proposed rule changes with the Commodity Futures Trading Commission that would create a new category of clearing membership, termed a "Direct Funding Participant." Under CME Group's proposal, a DFP could clear all of its eligible proprietary CME Group trades directly with the CME clearinghouse but would not be obligated to contribute to CME Group's guaranty fund or otherwise be responsible in case of a default by another clearing member. Instead, all of a DFP's obligations (except for obligations arising from disciplinary actions against a DFP) to CME Group would be guaranteed by at least one other clearing member – termed a "DFP Guarantor" – that must also be a CME Group clearing member and be registered with the CFTC as a futures commission merchant. A DFP Guarantor's guarantee fund deposit would be adjusted to account for the activity of the DFP it guarantees. DFPs would settle their margin requirements directly with the clearinghouse; however, if they did not, their financial obligations would have to be met by their DFP Guarantor. DFP margin requirements would be 104 percent of ordinary margin requirements, and DFP guarantors would have additional regulatory capital requirements equal to 4 percent of a DFP's margin requirement. A DFP Guarantor would be authorized to prescribe risk controls for its DFP at CME Group exchanges, including credit controls, increased margin levels and concentration limits, among others. A DFP Guarantor could perform back-office functions for its DFP. According to CME Group in its submission to the CFTC, the purpose of its proposed initiative is, among other things, to eliminate the possibility of a customer receiving a pro rata loss allocation in the case of an FCM bankruptcy where the FCM was left with insufficient resources to satisfy its obligations to all its customers in full. In addition, CME Group claimed that its proposal could help an FCM by eliminating the posting of cash by a DFP on the FCM's balance sheet and thus the possibility of a potential increase to the FCM's regulatory leverage capital ratio. CME Group's DFP proposal is scheduled to take effect on the earlier of September 23, 2016, or upon CFTC approval.

  > **My View**: In its rule proposal submission to the CFTC, CME Group acknowledged that some clearing members object that FCMs may potentially incur increased regulatory capital charges to serve as a DFP Guarantor. They argued that DFPs themselves should pay a minimum margin of 108 percent of requirements, as opposed to 104 percent, and there should be no additional capital requirements for a DFP Guarantor. CME Group rejected this argument, claiming that its proposal was more equitable and questioned "whether the DFP program does in fact create heightened capital requirements on the DFP Guarantor as compared to the capital requirements set out for FCM clearing members with respect to customers under Commission regulations." (This is because under CFTC capital rules, FCMs potentially must set aside 8 percent of a customer's margin requirements for positions carried with it. As a DFP Guarantor, an FCM would only potentially be required to set aside 4 percent of a DFP's margin requirements.) This latter argument by CME Group clearly has merit. However, CME Group's initiative is certainly more advantageous to FCMs with significant excess regulatory capital as opposed to FCMs will less excess regulatory capital. It also is not clear to me from my initial review of the proposed new rules what is the obligation of a DFP Guarantor because of its guarantee of a DFP in a situation where the clearinghouse levies an assessment on all clearing members because of the large default of another clearing member. That being said, even if there is some fine tuning before these proposed rules are finalized, CME Group's proposal would help customers that want to minimize their FCM risk and should be approved by the CFTC.

- **FINRA to Federal Courts: Our Rules Trump Your Decisions**: The Financial Industry Regulatory Authority issued a regulatory notice to member firms that warned them against eliminating the possibility of a FINRA arbitration in contracts with customers or associated persons (e.g., registered employees), despite recent court decisions that said that member firms could eliminate such availability. According to FINRA, under its rules, member firms must offer customers a right to arbitrate disputes with them at a FINRA arbitration forum (click here to access FINRA Rule 12200 and here to access FINRA Rule 2268). Although acknowledging recent federal appellate court decisions that held that forum selection causes in customer agreements supersede FINRA requirements, FINRA claimed that "the reasoning giving rise to these decisions is mixed and conflicts with FINRA's views regarding the application of its arbitration rules." Similarly, FINRA noted that a recent federal appellate court decision in New York held that an associated person could waive his or her right to a FINRA arbitration in a pre-dispute agreement, and agree to resolve all disputes with a member firm in a private forum (click here to access the relevant court decision). However, FINRA claimed that the court's view was inconsistent with its own rules (click here to access FINRA Rule 13200). FINRA warned member firms utilizing customer agreements or pre-dispute agreements with associated persons that do not comply with its requirements "may be subject to disciplinary action."

  > **My View**: It seems terribly inappropriate and unfair for FINRA to advise member firms that if they follow permissions given by a federal court that may be inconsistent with FINRA rules they "may be subject to disciplinary action." FINRA certainly may express its disappointment regarding a court outcome and work with the Securities and Exchange Commission to design an appropriate response (including a legislative proposal to submit to Congress), but, in the interim, threatening to take disciplinary actions against members who fail to follow its rules, despite appellate courts' views that such rules under certain circumstances do not have to be followed, seems to be a horrific precedent by a regulatory organization.

- **MF Global and Individual Defendants Finalize Settlement With Customers and Other Creditors**: The infamous history of MF Global is closer to ending after the administrator for the bankrupt holding company filed a proposed notice of settlement that, if approved, would provide a payment of US $132 million to resolve most outstanding litigation against the company and individual former officers by certain customers and other creditors. The funds would come from insurance proceeds from policies maintained on behalf of the former officers of MF Global that were named as defendants in the litigation, including John Corizine, former chief executive officer. An unspecified amount of funds from the same insurance proceeds, however, would be set aside to help fund the defense costs of Mr. Corizine and Edith O'Brien, former MF Global assistant treasurer, as well as any possible fine, in connection with their enforcement action by the Commodity Futures Trading Commission. (The CFTC filed a lawsuit against these two individuals and two MF Global companies in June 2013, charging them with failing to segregate customer funds and for misusing customer funds. Mr. Corzine was also charged with failure to supervise. The two corporate defendants have settled this action; the action against Mr. Corizine and Ms. O'Brien remains pending. (Click here for further details of this litigation in the article, "CFTC Files Long Awaited

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Enforcement Actions Related to MF Global Collapse" in the June 27, 2013 edition of *Between Bridges*).) A hearing on the administrator's proposed settlement will be held on August 11.

- **Global Head of FX Cash-Trading Desk of Global Investment Bank Arrested for Front Running**: Mark Johnson, former head of global foreign exchange cash trading at HSBC Bank, and Stuart Scott, former head of FX cash trading for HSBC for Europe, the Middle East and Africa, were named in criminal action brought by the US Attorney's Office in Brooklyn, NY, for allegedly front running an HSBC's customer's trading in British Pounds in November and December 2011. Both Mr. Johnson and Mr. Scott are UK citizens and residents. Mr. Johnson, also a US resident, was arrested in connection with this complaint on July 19. According to the criminal complaint, both individuals purportedly conspired to trade on information confidentially provided to HSBC by an unnamed customer that planned to sell part of its interest in an Indian subsidiary for US $3.5 billion, and then convert the sale proceeds to British Pounds for distribution to its shareholders. In October 2011, HSBC was awarded the mandate to arrange this conversion after the company conducted a Request for Proposal process involving approximately 10 banks. HSBC allegedly gave both defendants access to information regarding the proposed foreign exchange conversion and officially deemed them as "insiders." As insiders, alleged the complaint, the defendants "knew they had an obligation not to misuse the Confidential Information, including by front-running." Instead, said the complaint, defendants established their own British Pound positions in HSBC proprietary accounts to take advantage of the customer's impending conversion transaction, and orchestrated the customer's actual currency conversion in a manner to maximize their profits. According to the US Attorney's Office, HSBC profited by approximately US $8 million as a result of its execution of the FX transaction for the company, including from defendants' allegedly illicit conduct. The defendants were charged with conspiring to defraud a client.

  Legal Weeds: The criminal action against Mr. Johnson and Mr. Scott for fraud sounds like a securities action for insider trading based on a theory of misappropriation. A civil action was recently brought (and settled) by the Commodity Futures Trading Commission that also echoed the securities concept of insider trading, relying on the relatively new Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibition against employment of a manipulative or deceptive device in connection with futures trading. According to the CFTC, from September 3 through November 26, 2013, Arya Motazedi, a gasoline trader employed by an unnamed "large, publicly traded corporation" misappropriated "non-public, confidential and material information" of his employer to benefit his own trading of energy futures contracts listed on the New York Mercantile Exchange, Inc. Specifically, on 34 occasions Mr. Motazedi allegedly traded opposite his employer's accounts to effectively and illicitly transfer funds from the firm to himself, and on 12 other occasions he traded in advance of orders he placed for the firm to generate "additional profits for himself to the detriment of the company." The CFTC claimed that Mr. Motazedi owed a duty of confidentiality to his employer. This duty arose, said the Commission, because he and his employer "shared a relationship of trust and confidence," and because his employer had express policies that prohibited him from engaging in personal transactions that "created an actual or potential conflict of interest." The CFTC charged that Mr. Motazedi's trading constituted fraud, as well as impermissible fictitious sales and noncompetitive trades. (Click here for details regarding this enforcement action in the article, "CFTC Brings First Insider Trading-Type Enforcement Action Based on New Anti-Manipulation Authority" in the October 6, 2015 edition of *Bridging the Week*.) A second insider trading-type case may be pending at the CFTC. (Click here for details in the article, "Trader Sanctioned Over US $3 Million by CME Group for Trading on Confidential Employer Information; Both He and Wife Barred From Exchange Trading" in the June 19, 2016 edition of *Bridging the Week*.)

- **CME Group Sanctions Market Participants for Mishandling a Delivery, a Non-Bona Fide EFRP, a Transitory EFRP and Disruptive Trading**: INTL FCStone settled a disciplinary action brought by the New York Mercantile Exchange for allegedly not liquidating a customer's March 2016 RBOB Gasoline futures contract prior to the expiration of the contract's trading on February 29, 2016. Under relevant NYMEX rule (click here to access NYMEX Rule 716), INTL FCStone should have assessed whether its customer had the ability to take delivery prior to the contract's expiration, and when it determined it did not, it should have liquidated its position "in an orderly manner" before the final time of trading, said the NYMEX business conduct committee. FCStone agreed to pay a fine of US $15,000 to resolve this matter. Separately, BGC Radix Energy LP agreed to pay a fine of US $20,000 to resolve charges brought by NYMEX that, solely as a broker, it executed exchange for related position transactions on August 27, 2014, that did not involve the transfer of a related position (BGC was not a principal to the EFRPs; it executed the relevant EFRPs for principals). Bona fide EFRPs must involve transfers of related positions or a binding contract between the parties in accordance with relevant market practices. In addition, JPMorgan Chase Bank NA agreed to pay a fine of US $30,000 also to resolve charges brought by NYMEX related to alleged non-bona fide EFRPs. According to NYMEX, on January 8, 2015, JPMorgan entered into an EFRP where the related position "appears to have been offset in a manner designed to avoid material market risk." The NYMEX BCC said this was a prohibited transitory EFRP. Finally, Yingdi Liu settled disciplinary actions brought both by NYMEX and the Commodity Exchange, Inc. for allegedly engaging in disruptive trading practices. The exchanges alleged that on multiple days in April 2015 Mr. Liu layered orders on one side of the market in order to induce traders to trade opposite smaller orders he had resting on the other side of the market. Mr. Liu agreed to pay the CME Group exchanges US $35,000 to resolve their charges, and not to trade on any CME Group exchange for 20 business days.

  Compliance Weeds: On CME Group, FCMs may only permit customers capable of making or taking delivery from carrying positions prior to a futures contract expiration that entails a delivery obligation. FCMs are affirmatively obligated to confirm that each customer can fulfill its delivery obligations (either making or taking delivery), and if not, are required to liquidate the customer's position in an orderly manner prior to contract expiration. This concept of an orderly liquidation is also associated with the concept of bona fide hedging – although the obligation is that of the hedging entity, not an FCM. Under the definition of bona fide hedging transaction under applicable law, no positions may qualify as bona fide hedge positions (and thus potentially available for an exemption from position limits) unless the positions are maintained (1) to offset price risks derived from commercial cash or spot operations and (2) such positions "liquidated in an orderly manner in accordance with sound commercial practices" (Click here to access the relevant provision of the Commodity Exchange Act, Sec. 1.3(z)(1).)

- **CFTC Staff Suggest Measures by Clearinghouses to Enhance Recovery and Wind-Down Plans**: Staff of the Commodity Futures Trading Commission's Division of Clearing and Risk issued guidance to derivatives clearing organizations regarding their obligation to maintain "viable plans" for their recovery and orderly wind-down, following a major adverse financial event, or any risk that threatens their ongoing existence. This obligation exists for all DCOs that have been designated "systematically important" by the Financial Stability Oversight Counsel or have voluntarily elected to

be treated as a systematically important DCO. According to staff, "the development of a Recovery Plan and ... Wind-down Plan are critical elements of risk management and contingency planning to address the extreme circumstances that could threaten a DCO's viability and financial strength." In its guidance, staff recommend that DCOs address 11 elements in their recovery and wind-down plans including scenarios; recovery tools, wind-down scenarios and options; interconnections and interdependencies; agreements to be maintained during recovery and wind-down; financial resources; governance; notifications; assumptions; updates; and testing. In considering scenarios, staff recommend that DCOs evaluate both credit loss and liquidity shortfall scenarios, and general business risk and operational risk scenarios such as a settlement or custodian bank failure; losses from investments, a legal matter, or a cybersecurity event; poor business results; and losses "from interconnections and interdependence among the DCO and its parent, affiliates, and/or internal or external service providers."

- **UK FCA Recognizes Value of Dark Pools but Urges More Public Details Regarding Operations and Conflicts of Interest**: The UK Financial Conduct Authority published a thematic review of dark pools, finding that, although it did not observe any failure to follow regulatory obligations, it did find a "number of areas where improvement is required." These areas included, among others, offering better transparency regarding the design and operation of dark pools; enhancing monitoring of dark pools by operators to ensure operational integrity; and better identifying and managing conflicts of interest. However, overall, FCA found that users of dark pools welcomed their liquidity, lower risk of information leakage and "the potentially beneficial impact on pricing and costs that dark pools offered." Moreover, acknowledged FCA, "[o]perators have clearly responded to public concern and regulatory interventions by addressing business model design, promotional materials now in use, and the management of conflicts of interests around dark pools." Dark pools are private forums for transacting securities typically owned by a single investment firm, where there typically is no pre-trade transparency because all orders are hidden as to price and volume, and are anonymous. FCA urged dark pool and broker-crossing network operators to consider its thematic review and areas of suggested improvements going forward.

And more briefly:

- **ESMA Fines Rating Agency For Breakdowns in Internal Controls**: The European Securities and Markets Authority fined Fitch Ratings Limited €1.38 million for a number of different breaches of its regulations pertaining to credit rating agencies. Fitch Ratings' alleged breaches included sharing nonpublic information regarding certain sovereign ratings with senior persons in its parent company before it was made public, and failing to provide a sovereign state 12 hours' prior notice as required to respond to a proposed credit downgrade before making such downgrade public. The purported breaches apparently occurred in or prior to February 2013.

- **SGX to Transfer Regulatory Functions to Separate Company**: The Singapore Exchange will establish a separate new subsidiary company to perform its "front-line" regulatory functions. Its objective is to make "more explicit the segregation of its regulatory functions from its commercial and operating activities." Under its plans, SGX's new regulatory functions' entity will have a board of directors different from that of SGX, and the chairman of the new entity's board and a majority of its members will be independent. According to the Monetary Authority of Singapore, SGX's actions will be "an important step in strengthening the safeguards to manage potential conflicts of interest between SGX's commercial and regulatory roles."

- **ESMA Issues Update on Extension of Funds' Marketing Passport to 12 Non-EU Countries**: The European and Securities Markets Authority reported that equivalency in oversight of US and European Union investment funds not involving any public offerings marketed by managers warranted granting by the European Commission of marketing passport rights to US fund managers in the EU. If granted, US fund managers would have the authority to access EU investors without complying with some national requirements under applicable law (i.e., the Alternative Investment Fund Managers Directive); however they still would most likely be subject to requirements related to capital, depositories and remuneration, among others. ESMA recommended however, that if such passport rights were granted, such benefit be limited to US funds dedicated to professional investors in the US that involve no public marketing and are not mutual funds (under the 1940 Investment Company Act). ESMA did note, however, fund managers from the EU accessing the US would likely encounter tougher regulatory barriers than US fund managers accessing the EU through a passport. (Click here for further details in the article, "ESMA Publishes Advice on Potential Extension of AIFMD Marketing Passport" in the July 22 edition of Katten Muchin Rosenman LLP's *Corporate and Financial Weekly Digest*.)

- **SGX Acknowledges July 14 Exchange Shutdown Due to Hardware Failure**: The Singapore Exchange announced that its unscheduled early shutdown on July 14 was caused by a computer disk failure and the failure of an application that was designed to detect the problem. As a result of the application failure, SGX did not revert to a backup secondary system. These problems caused SGX to shut down at 11:38 a.m. for the remainder of the day.

For more information, see:

CFTC Staff Suggest Measures by Clearinghouses to Enhance Recovery and Wind-Down Plans:
http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-61.pdf

CME Group Proposes New Clearing Member Category to Help Customers Avoid Pro Rata Distribution Risk in Case of FCM Insolvency:
http://www.cmegroup.com/market-regulation/rule-filings/2016/07/16-301.pdf

CME Group Sanctions Market Participants for Mishandling a Delivery, a Non-Bona Fide EFRP, a Transitory EFRP and Disruptive Trading:

BGC Radix:
http://www.cmegroup.com/notices/disciplinary/2016/07/NYMEX-15-0087-BC-6-BGC-RADIX-ENERGY-LP.html#pageNumber=1
INTL FCStone:
http://www.cmegroup.com/notices/disciplinary/2016/07/NYMEX-16-0394-BC-INTL-FCSTONE-FINANCIAL-INC.html#pageNumber=1
JPMorgan Chase Bank:
http://www.cmegroup.com/notices/disciplinary/2016/07/NYMEX-15-0254-BC-2-JPMORGAN-CHASE-BANK-NA.html#pageNumber=1

Yingdi Liu:
http://www.cmegroup.com/notices/disciplinary/2016/07/COMEX-15-0143-BC-YINGDI-LIU.html#pageNumber=1
http://www.cmegroup.com/notices/disciplinary/2016/07/NYMEX-15-0143-BC-YINGDI-LIU.html#pageNumber=1

ESMA Fines Rating Agency For Breakdowns in Internal Controls:
https://www.esma.europa.eu/sites/default/files/library/2016-1131_decision_on_fitch.pdf

ESMA Issues Update on Extension of Funds' Marketing Passport to 12 Non-EU Countries:
https://www.esma.europa.eu/sites/default/files/library/2016-1140_aifmd_passport_1.pdf

FINRA to Federal Courts: Our Rules Trump Your Decisions:
http://www.finra.org/sites/default/files/notice_other_file_ref/Regulatory-Notice-16-25.pdf

Global Head of FX Cash-Trading Desk of Global Investment Bank Arrested for Front Running:
https://www.justice.gov/usao-edny/pr/global-head-hsbc-s-foreign-exchange-cash-trading-desks-arrested-orchestrating

MF Global and Individual Defendants Finalize Settlement With Customers and Other Creditors:
http://docket_pdfs.gcg.net/mfg/11-15059/2271_15059.pdf

SGX Acknowledges July 14 Exchange Shutdown Due to Hardware Failure:
http://www.sgx.com/wps/wcm/connect/sgx_en/home/higlights/news_releases/SGX_provides_further_details_on_market_disruption

SGX to Transfer Regulatory Functions to Separate Company:
http://www.mas.gov.sg/News-and-Publications/Media-Releases/2016/Separate-Subsidiary-Will-Strengthen-Governance-of-SGX-Regulatory-Functions.aspx

UK FCA Recognizes Value of Dark Pools but Urges More Public Details Regarding Operations and Conflicts of Interest:
http://www.fca.org.uk/static/documents/thematic-reviews/tr16-05.pdf

ABOUT GARY DEWAAL

Gary DeWaal is currently Special Counsel with Katten Muchin Rosenman LLP in its New York office focusing on financial services regulatory matters. He provides advisory services and assists with investigations and litigation.

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CONTACT US

Gary DeWaal
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022-2585

+1.212.940.6558

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