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ORICAL REGULATORY UPDATE

REGULATORY UPDATE

CFTC Charges Merchant with Fraud, Manipulation and First Ever Action Against Impeding Whistleblower Communications

06.17.24. The CFTC settled charges against Trafigura Trading LLC ("Trafigura") for violations of the Commodity Exchange Act, resulting in a $55 million penalty and remedial measures. Between 2014 and 2019, Trafigura obtained and subsequently traded on material non-public information ("MNPI") from an employee of a Mexican trading entity. The MNPI contained the Mexican entity's pricing formulas and competitor pricing information, which demonstrably influenced Trafigura's trading and business decisions during that period.

The CFTC additionally found that Trafigura manipulated the benchmark price of U.S. Gulf Coast oil. Trafigura ran an arbitrage strategy that exported fuel oil from the U.S. Gulf Coast to Singapore to profit from an open arbitrage for fuel oil. In running this strategy, Trafigura created an artificial long derivative position in excess of the short physical position, resulting in a speculative bet on fuel oil prices and a market benchmark not reflective of the true supply and demand forces. Further, Trafigura required current and former employees to sign employment and separation agreements containing non-disclosure provisions, which illegally impeded individuals from communicating with the CFTC's Division of Enforcement during the investigation.

UK-Based Introducing Broker Charged with NFA Rule Violations

06.24.24. The NFA settled with Clarksons Platou Futures Limited ("Clarksons"), a London-based registered introducing broker and swap firm. Stemming from an August 2022 examination, the NFA found numerous deficiencies; Clarksons will pay $250,000 to resolve charges of (i) failing to register three individuals as associated persons, (ii) failing to keep pre-trade communications as a part of required books and records, (iii) disclosing confidential information and (iv) failing to supervise its employees and agents.

California Firm Consents to a Judgment with SEC

06.26.24. Lufkin Advisors, LLC (the "Firm") and its President, Chauncey Forbush Lufkin, III, consented to the entry of a final judgment with the SEC relating to violations of the Investment Advisers Act. The SEC alleged that, for years, the Firm engaged in fraudulent conduct that included (i) a loss of control of crypto assets entrusted to the Firm, (ii) improper disclosure that fund investors were engaged in transactions with Mr. Lufkin's spouse's company, (iii) a failure to account for withdrawals from private funds, and (iv) a "general derogation of their duty to manage the assets entrusted to [the Firm]."

Additionally, Mr. Lufkin and the Firm failed to comply with the custody rule, provided clients and the SEC with inaccurate disclosures, did not have an established Code of Ethics, and failed to provide the Commission with requisite books and records of the Firm upon request, despite a statutory obligation to do so. Mr. Lufkin and the Firm were ordered to pay $425,000 in penalties.

CFTC Awards Over $8 Million to Insider Whistleblower

06.17.24. The CFTC awarded over $8 million to a single whistleblower who helped the CFTC and other regulators bring several enforcement actions. The whistleblower provided key information that derivative market actors deceived clients about crucial aspects of trades by providing evidence of their own intent as well as their knowledge about clients, co-workers, and leadership of the entities.

Are You Ready for Your Next Regulatory Exam? Orical has extensive experience assisting clients on marketing rule sweeps, routine regulatory exams and facilitating SEC or CFTC exam readiness assessments or mock audits.

Do You Have New Investors? See if You Need to Make a Form D (federal) filing, or a Blue Sky (state) Filing, which must be filed by a fund relying on Regulation D within 15 days following the fund's first sale. Contact us to file yours.

Form N-PX on Compensation of 13F Filers

06.18.24. This August, institutional investment managers subject to Section 13(f) of the Securities Exchange Act of 1934 will now need to comply with the Securities and Exchange Commission (the "SEC" or "Commission") 2022 amendments to Form N-PX. Intended to make these proxy voting records easier for investors to analyze, the amendments require institutional managers to annually report their votes on matters related to an issuer's executive compensation ("say-on-pay" matters). This includes votes to: (1) approve the compensation of its named executive officers; (2) determine the frequency of such executive compensation votes; and (3) approve "golden parachute" compensation in connection with mergers and acquisitions activity. 13F filers will need to include in their reports the proxy-soliciting issuer's proxy card language and relevant categorization, disclose securities loaned but not recalled, and file reports in XML format.

By August 31, institutional managers need to report their votes cast on say-on-pay matters for the period of July 1, 2023 to June 30, 2024. Any filers who did not vote on say-on-pay matters during this period must file a notice report indicating as such.

Tides are Turning: Supreme Court Reining in the Administrative State

07.01.24. In a 6-3 decision by the Supreme Court in *Securities and Exchange Commission v. Jarkesy,* the Court held that the Seventh Amendment must stand: accused defendants in antifraud actions have a right to a jury trial, and accordingly, the SEC may not seek civil penalties in such cases through their in-house enforcement tribunals, which lack juries.

This landmark finding stymies the SEC's ability to bring civil penalties outside a federal court venue. However, the Court's opinion did not conclusively address how the Seventh Amendment may apply in cases alleging violations other than those promulgated in part under antifraud statutes, such as those related to registration or books and records. Chief Justice Roberts for the majority opinion wrote "[enforcement proceedings conducted by the SEC internally] is the very opposite of the separation of powers that the Constitution demands." The extent of this decision has yet to be seen.

In a similar 6-3 ruling in the case *Loper Bright Enterprises v. Raimondo*, the Court further moved to weaken the power of federal agencies by overturning the 1984 case *Chevron U.S.A., Inc. v. The Natural Resources Defense Council, Inc*. The legal doctrine known as "Chevron deference" prohibited a federal court from substituting its own interpretation of a vague statute in place of a federal agency's "reasonable" interpretation of the same statute. With Chevron overturned, new rules and regulations created will likely have a difficult time surviving the scrutiny of federal courts.

UPCOMING COMPLIANCE DEADLINES:

Form 13F-Q: 8/14/2024
Form PQR: 08/29/2024
Form PF-Q: 08/29/2024
Initial Form N-PX: 8/31/2024