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SEC/CORPORATE

SEC Settles With Adviser That Allegedly Overcharged Management Fees and Misled Investors

On January 19, the Securities and Exchange Commission announced that it had settled with Equinox Fund Management LLC (Equinox). The SEC order found that Equinox, with respect to its managed futures fund (the Fund), had overcharged management fees to investors and failed to follow its valuation methods as disclosed to investors.

The SEC Order alleges that:

1. From 2004 through March 2011, the Fund's registration statements disclosed that Equinox charged management fees based on the net asset value (NAV) of each series, when Equinox actually charged the Fund management fees based on the notional trading value of the assets (i.e., including leverage), thereby charging the Fund $5.4 million more than what would have been charged upon NAV;

2. The Fund's Form 10-K for 2010 and its Forms 10-Q for the first and second quarters of 2011 disclosed that its methodology of valuing certain derivatives was "corroborated by weekly counterparty settlement values," when in fact, Equinox received certain information during that timeframe showing that its valuation of certain options was materially higher than the counterparty's indicative settlement valuations;

3. The Fund's Form 10-Q for the third quarter of 2011 disclosed that an option had been transferred between two series in accordance with the Fund's valuation policies, when in reality, the option had been transferred using a different valuation methodology than substantially identical options held by other Fund series; and

4. The Fund's Form 10-Q for the second quarter of 2011 failed to disclose as a material subsequent event the series' early termination of an option (which constituted the series' largest investment) at a valuation that was materially different than had been recorded for that option.

Equinox was ordered to pay $5.4 million in disgorgement of management fees, $600,000 in prejudgment interest and a $400,000 penalty.

The SEC's press release can be found here.

SEC Adopts Interim Final Rules as Mandated by the FAST Act

On January 13, the Securities and Exchange Commission announced that it adopted interim final rules to implement changes to Form S-1 and Form F-1 mandated by the Fixing America's Surface Transportation Act (FAST Act). The interim final rules revise Form S-1 and Form F-1 to permit emerging growth companies (EGCs) to omit Regulation S-X financial information for historical periods otherwise required at the time of filing (or confidential submission), provided that the issuer reasonably believes the omitted financial information will not be required in the Form S-1 or F-1 at the time of the contemplated offering and that, prior to the issuer distributing a preliminary prospectus, such registration statement is amended to include all required Regulation S-X financial information at the date of such amendment. The interim final rules also amend Form S-1 to include a new Item 12, and amend Item 512(a) of Regulation S-K, to permit a smaller reporting company to incorporate by reference into a Form S-1 any reports or materials filed with the SEC after the effective date of the company's registration statement (commonly referred to as "forward incorporation by reference"). This ability to forward incorporate by reference, which is conditioned on the issuer meeting the eligibility requirements already applicable to historical incorporation by reference into a Form S-1 (e.g., filing of an annual report for the most recent fiscal year and filing of required reports under the Securities Exchange Act of 1934 for the past 12 months or, if shorter, the period in which the issuer has been a reporting company), will ease the burdens on reporting issuers that are conducting public offerings or registering shares for resale on Form S-1 because they are ineligible to do so on Form S-3.

The interim final rules will become effective upon publication in the *Federal Register*, and the public comment period will remain open for 30 days following their publication in the *Federal Register*.

The full text of the interim final rules can be found here.

BROKER-DEALER

FINRA Issues Notice on the Application of the Mark-Up Rule to Exempted Government Securities Transactions

The Financial Industry Regulatory Authority released Regulatory Notice 16-03, which discusses the Securities and Exchange Commission's approval of amendments to FINRA Rule 0150 (Application of Rules to Exempted Securities Except Municipal Securities). The amendments codify the application of FINRA Rule 2121 (Fair Prices and Commissions) and its Supplementary Material .01 and .02 (the "mark-up rule") to exempted government securities transactions, including those involving US Treasury securities. FINRA noted that any mark-ups and/or commissions related to government securities transactions must comply with both the mark-up rule and FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade). The new amendments also provide criteria that firms can use when measuring and assessing the propriety of debt mark-ups, mark-downs and commissions related to such transactions.

FINRA Regulatory Notice 16-03 is available here.

DERIVATIVES

See "Extension of Time-Limited, Conditional No-Action Relief Regarding Masking Certain Reportable Identifying Information" and "CFTC Issues Order Delegating to the NFA Certain Functions Related to Notices of Swap Valuation Disputes" in the CFTC section.

CFTC

Extension of Time-Limited, Conditional No-Action Relief Regarding Masking Certain Reportable Identifying Information

On January 15, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) issued CFTC letter 16-03 ("Letter") providing a conditional, time-limited extension of the relief provided in CFTC Letter 13-41, issued on June 28, 2013, regarding the masking of certain identifying information required to be reported in connection with swaps required to be reported to a swaps data repository. The CFTC had previously authorized the masking of certain identifying information in response to concerns by expressed by the International Swaps and Derivatives Association, Inc., on behalf of its members, regarding potential inconsistencies between CFTC requirements and privacy and blocking laws of certain foreign jurisdictions. The Letter, permits, among other things, (1) adding jurisdictions that may be eligible for relief as foreign jurisdictions, and (2) reporting parties who previously met the conditions in CFTC Letter 13-41, or who will meet those conditions in the future, to fulfill their reporting obligations while acknowledging privacy, secrecy and blocking laws in the relevant foreign jurisdictions.

DMO's new relief will be available until the earlier of the date the reporting party no longer maintains the requisite reasonable belief regarding the privacy law consequences of reporting or 12:01 a.m. (EST) on March 1, 2017.

To see the Letter, click here.

CFTC Issues Order Delegating to the NFA Certain Functions Related to Notices of Swap Valuation Disputes

The Commodity Futures Trading Commission has authorized the National Futures Association (NFA) to receive, review, maintain and serve as the official custodian of records for notices of swap valuation disputes in excess of US $20 million (or its equivalent in other currencies) provided by swap dealers (SDs) and major swap participants (MSPs), pursuant to its Regulation 23.502(c), effective March 1. Under CFTC rules, SDs and MSPs are currently required to notify the CFTC in connection with such disputes if they are not resolved within a certain time frame. As part of its delegation, the NFA is required to provide the CFTC summaries and reports regarding such notices.

To see the order, click here.

CFTC Launches Whistleblower Program's Website

On January 21, the Commodity Futures Trading Commission launched its Whistleblower Program's new website, www.whistleblower.gov. The new website has a user-friendly interface to help educate the public regarding the Whistleblower Program, including whistleblower rights and protections, the process for filing a tip and applying for an award. Users also can submit tips on potential Commodity Exchange Act violations and apply for monetary awards on the website.

To see the press release, click here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

See "SEC Settles With Adviser That Allegedly Overcharged Management Fees and Misled Investors" in the SEC/Corporate section.

ANTITRUST

FTC Announces Revised Hart-Scott-Rodino Filing Thresholds

On January 21, the Federal Trade Commission (FTC) announced the new filing thresholds that will apply to mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act). The changes will go into effect in late February, 30 days after they are published in the *Federal Register*. Under the revised notification thresholds, transactions valued above $78.2 million will require HSR notification when they meet the other requirements of the HSR Act. This is an increase from the current threshold of $76.3 million. The filing thresholds for larger transactions will be adjusted as well. The current $152.5 million threshold will be increased to $156.3 million, and the current $762.7 million threshold will be increased to $781.5 million.

Under the new thresholds, the filing fee for notifiable transactions valued above $78.2 million but less than $156.3 million remains at $45,000. Transactions valued above $156.3 million but below $781.5 million will require a filing fee of $125,000. Transactions valued above $781.5 million will require a filing fee of $280,000.

For transactions valued between $78.2 million and $312.6 million under the HSR Act, the "size of person" test also must be met for a filing to be required. The size of person thresholds have also been increased. Under the new thresholds, one party to the transaction must have net sales or total assets of at least $15.6 million, and another party to the transaction must have net sales or total assets of at least $156.3 million. Transactions valued greater than $312.6 million under the HSR rules will require a filing regardless of the size of the persons involved.

The FTC's announcement on the revised thresholds is available here.

EU DEVELOPMENTS

ACER announces 11th Public Workshop on REMIT Implementation

On January 15, Europe's Agency for the Cooperation of Energy Regulators (ACER) announced its 11th Public Workshop (Workshop) on the implementation of the European Union's Regulation on Wholesale Energy Market Integrity and Transparency (REMIT).

As discussed in the *Corporate & Financial Weekly Digest* edition of December 9, 2011, REMIT came into effect on December 28, 2011 and is designed to strengthen European Union monitoring and prohibitions on market abuse and insider dealing in the wholesale energy market, in part through requiring that market participants transacting in wholesale energy products register with the relevant national energy regulator and submit transaction reports in respect of their wholesale energy trading. An implementing regulation, which came into effect on January 7, 2015, sets out a list of reportable contracts, reporting channels and the timing for reporting.

The Workshop will be held on February 16 and will review the rollout of the first phase of REMIT transaction reporting, which started on October 7, 2015 for most exchange-traded wholesale energy products. The Workshop also will attempt to hammer out any outstanding issues in advance of the second phase of REMIT transaction reporting, which applies to all remaining wholesale energy products from April 7, 2016. The Workshop also will include a special session on the role of registered reporting mechanisms in facilitating the submission of REMIT transaction reports in the second reporting phase.

REMIT can be found here and the implementing regulation can be found here. ACER also has released a REMIT Reporting User Package, which includes the Transaction Reporting User Manual and report data fields, which can be accessed here.

A copy of ACER's Workshop announcement can be found here. A copy of the Workshop agenda can be found here.

ESMA Publishes European Commission Letter on AIFMD Passport

On January 19, the European Securities and Markets Authority (ESMA) published on its website a letter it received from the European Commission (Commission), dated December 17, 2015. The letter is in response to guidance and an opinion provided by ESMA on July 30, 2015 to the Commission, in relation to the Alternative Investment Fund Managers Directive (AIFMD) passport.

The Commission has requested in its letter that ESMA complete an assessment (by June 30) of (1) the United States, Hong Kong and Singapore, and (2) another six third-country jurisdictions, including Japan, Canada, Isle of Man, Cayman Islands, Bermuda and Australia. ESMA would then determine if the AIFMD passport should be extended to any of them.

The Commission also noted in its letter that ESMA should produce a further opinion on the functioning of the passport and national private placement regimes once the AIFMD has been implemented into national law of all member states.

For further information on ESMA's original guidance and opinion, see our *Corporate & Financial Weekly Digest* edition of July 31, 2015 and *Corporate & Financial Weekly Digest* edition of October 16, 2015.

A copy of ESMA's press release can be found here.
A copy of the Commission's letter to ESMA can be found here.
A copy of ESMA's original guidance can be found here and ESMA's opinion, here.

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

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	+1.212.940.6447	peter.shea@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
ANTITRUST		
James J. Calder	+1.212.940.6460	james.calder@kattenlaw.com
EU DEVELOPMENTS		
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@kattenlaw.co.uk

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Katten Muchin Rosenman LLP www.kattenlaw.com

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