Cipperman Compliance Services LLC

480 East Swedesford Road,
Suite 300
Wayne, PA 19087

610.687.5320
www.cipperman.com

FIA Law and Compliance Conference

May 2-4, 2018

Washington, DC

This year was the 40th anniversary of the FIA Law and Compliance Conference, which attracts nearly 900 legal and compliance professionals every year to learn and discuss the legal and regulatory issues impacting the derivatives industry. The Futures Industry Association (FIA) is a leading global trade organization for the futures, options and centrally cleared derivatives markets. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

Day 1

Cryptocurrencies and Blockchain: The Product

Moderator: Kimberly Johns, Managing Director and Associate General Counsel, Goldman Sachs

Speakers: Jeff Bandman, Founder and Principal, Bandman Advisors; Stephen Obie, Partner, Jones Day; Ryne Miller, Associate, Sullivan & Cromwell; Andrew Ridenour, GDAX Counsel, Coinbase, Inc.

The opening session of the conference focused on the origins of cryptocurrency, its development over the past few years, and the potential concerns that have been raised by the financial community as it forges its trajectory into the mainstream financial world. The panelists first summarized the basic concepts behind transacting in cryptocurrencies: the unique nature of cryptocurrency as a virtual currency not backed by a sovereign entity, the processes behind blockchain technology and cryptography, and the different aspects of transaction recordation and distribution through ledger technology.

Before analyzing the current issues and risks involved in cryptocurrency transactions, the panelists made sure to acknowledge the origin of cryptocurrencies, which can be pinpointed to a 2008 whitepaper attributed to the pseudonymous Satoshi Nakomoto, titled **"Bitcoin – A Peer to Peer Electronic Cash System."** They emphasized that the spirit behind creating Bitcoin, per Nakomoto's whitepaper, was a direct response to the Global Financial Crisis and the damage caused by trusting financial institutions as intermediaries to financial transactions. The concept of Bitcoin, as introduced in Nakomoto's whitepaper, purported to eliminate the use of 'middle man' financial institutions in transaction validation, and replace

them with a decentralized, transparent system that would use the consensus of a community of data miners to validate and settle transactions all in a matter of minutes.

As the cryptocurrency market has grown rapidly since the release of the whitepaper, there have been some questions and concerns that have arisen. For example, the panelists suggested one of the concerns involves cryptocurrency's potential inability to avoid double-spending, with its lack of a sovereign authority monitoring these transactions. Proponents of cryptocurrency have attempted to debunk this concern by acknowledging that there will always be "bad actors," but blockchain technology allows for cryptocurrency transactions to be fully transparent between counterparties, which helps mitigate the risks involved with transacting through a decentralized system. The panelists also described some operational issues that have been associated with transacting on cryptocurrency networks.

Cryptocurrencies Regulation

Moderator: Gary DeWaal, Special Counsel, Katten Muchin Rosenman

Speakers: Joseph Borg, Director, Alabama Securities Commission and President or North American Securities Administrators Association; Gary Godlsholle, Senior Advisor to the Director of the Division of Trading and Markets – Securities and Exchange Commission, Daniel Gorfine, Chief Innovation Officer & Director, LabCFTC, Commodity Futures Trading Commission; Kari Larsen, Counsel, Reed Smith; Lee Schneider, Partner, McDermott Will & Emery

The panelists first acknowledged the most recent affirmative stance taken by the SEC, which suggested that certain cryptocurrency transactions, such as ICOs or token sales, should be treated as securities transactions and thus be subject to federal securities laws, including the requirement for registration. The Report suggested that the SEC's purpose behind taking this stance was, at the very least, to protect investors.

While the panelists all agreed that retail investor protection is an important cause for the regulators to continue pushing for jurisdiction over cryptocurrencies, the determination of whether or not a cryptocurrency is a security should be held to the light of the *Howey* Test, which is the test derived from the seminal case *SEC v. W.J. Howey Co.* 328 U.S. 293 (1946). The Court in *Howey* held that an instrument should be considered an "investment contract" subject to federal securities laws if it involves the following: i) an investment of money, ii) in a common enterprise, iii) with an expectation of profit, iv) based solely on the efforts of others. As for the CFTC's efforts to assert jurisdiction, the CFTC might assert jurisdiction over virtual currencies (such as Bitcoin), but conceded that the SEC may have jurisdiction over virtual tokens (which can be purchased with virtual currencies) and virtual organizations that offer and sell these virtual tokens. The panelists noted that even if the SEC's and CFTC's respective arguments for jurisdiction fail, the state regulators and FinCEN may also have a place in this debate, since certain cryptocurrency exchanges or platforms may be deemed "money transmitters" and thus subject to state anti-money laundering laws or FinCEN registration.

The panelists concluded the session with some of their opinions on the future of cryptocurrency regulation. They believe that digital currencies will become fiat one day, that we are moving toward a tokenized economy, and that cryptocurrency is certainly here to stay. They cautioned, however, to be on

high alert for potential AML issues, and the dangers in dealing with a digital currency. After all, a token is not just for purchasing ICOs– it can be a digital representation of anything.

The first day of the conference concluded with a Keynote Address by Commissioner Brian Quintenz of the Commodity Futures Trading Commission. Commissioner Quintenz emphasized the joint goal of coordination and harmonization of regulatory oversight between the CFTC and SEC, and that, despite their different missions and markets of focus, they share the common interests of "promoting market integrity, preventing fraud and manipulation, and fostering market innovation and fair competition." The Commissioner briefly discussed some of the recent instances of cooperation between the two regulators in enforcement cases against entities that hold dual registrations with both regulators (such as securities-based swap dealers, commodity pool operators and commodity trading advisers). Lastly, the Commissioner discussed the progress of key initiatives, such as Project KISS, and the updating of the SEC-CFTC Memorandum of Understanding (MOU), which will further assist in their harmonization efforts.

Day 2

Hot Topics: AML, Cybersecurity, Privacy, GDPR

Moderator: Patricia Donohue, Executive Vice President, Chief Compliance Officer & Regulatory Counsel, Rosenthal Collins Group

Speakers: Melise Blakeslee, Managing Partner, Sequel Technology & IP Law, and Chief Executive Officer, Achieved Compliance; Janet McCormick, Executive Director of Compliance, Mizuho Securities USA; Stephen Montgomery, Director, Wells Fargo Securities; Margaret Paulsen, Senior Managing Director, PricewaterhouseCoopers; Betty Santangelo, Partner, Schulte Roth & Zabel

The panelists opened with a discussion on the FinCEN Customer Due Diligence ("CDD") requirements, which aims to improve financial transparency and help financial institutions and law enforcement agencies to detect illicit transactions. Another recent piece of regulation that was discussed was the European Union's General Data Protection Regulation ("GDPR") Requirements, which impose certain limitations around the export of personal data outside of the EU. The panelists indicated that the challenges many firms have faced in trying to meet the required deadlines for compliance (May 11th and May 25th for the CDD and GDPR respectively) lies in their confusion around certain definitions used in these respective rules.

On the cybersecurity front, the panelists discussed the challenges that NFA member firms have faced in attempting to comply with the NFA's Interpretive Notice on Cybersecurity. The notice, which has been in effect since March 2016, requires member firms to adopt and enforce written policies and procedures to secure customer data and access to their electronic systems. The panelists emphasized that the key to complying with the requirements of this notice involves a fulsome understanding of the following three things: i) who has access to the firm's and their customers' data, ii) where this data is stored, and iii) how

the data is it being protected. In addition, the panelists indicated that the two most important steps that these firms can take in building strong, compliant Information Systems Security Programs ("ISSPs") is to: i) maintain and refresh quality documentation on the scope of their ISSP, and ii) create a fluid line of communication between the firm's Information Security Team and the team responsible for their SEC Disclosures.

MiFID Status

Moderators: Matthew VosBurgh, Director, Barclays; Matt Lischin, Director & Senior Counsel, RBC Capital Markets

Speakers: Jon DeBord, Senior Vice President & Assistant General Counsel, Citigroup Global Markets; Nathaniel Lalone, Partner, Katten Muchin Rosenman UK; Michael Piracci, Director – Compliance, Scotiabank; Mitja Siraj, Vice President of Legal - Europe, FIA

The discussion in this mid-morning session focused on the unresolved issues surrounding the MiFID II regulation, which was made effective on January 3, 2018. The panelists noted that one of the core elements of MiFID II is firm data. The regulation attempts to help firms improve their capturing, storage and reporting of data. The panelists also discussed some recent updates to the regulation that MiFID II. The panelists emphasized that there are certain ancillary aspects to the regulation that will impose additional significant compliance requirements on firms, such as the limits imposed on indirect clearing of derivatives.

Ultimately, the panelists believe that firms subject to the MiFID II regulation will only truly start to change in response to the passing of this regulation once the first round of MiFID II enforcement actions come into play. The panelists also believe that firms should try to adopt a best efforts approach to MiFID II compliance, rather than attempt to adhere to a strict, principles-based approach, which could potentially expose the firm to more scrutiny by regulators. As for the issue of Brexit, and its potential to create a fractured regime in the UK, the panelists predict that there will be a UK version of MiFID created in the post-Brexit world, which will simply require a recalculation of the transparency requirements for British firms.

CCO Developments & Challenges

Moderator: Michelle Broom, Executive Director – Risk Management Group, Macquarie Group

Speakers: Joe Cerullo, Chief Compliance Officer, Futures Commission Merchant & U.S. Swap Dealers, J.P. Morgan; Rosario Chiarenza, Executive Director & Head of Regulatory Reform Strategy, Legal and Compliance Division, Morgan Stanley; Annette Nazareth, Partner, Davis Polk & Wardwell, Felicia Rector, Co-Head – Americas Securities Compliance Division, Goldman Sachs; Erik Remmler, Deputy Director, Registration and Compliance, Division of Swap Dealer and Intermediary Oversight, Intermediary Oversight, Commodity Futures Trading Commission

This early afternoon session of the second day discussed recent regulatory developments that affect CCOs and the challenges they face in building effective compliance frameworks amid a constantly shifting

regulatory landscape. The panelists' focus was on one over-arching challenge: trying to reconcile overlapping and conflicting regulations. The panelists opened the session with a brief discussion on the May 2017 updates made to CFTC Rule 3.3(a)(1), which was amended to reflect CCO duties that more closely resemble the SEC rules that are applicable to dually-registered entities, such as securities-based swap dealers.

The panelists then shifted their focus to a discussion on some much-needed cross-jurisdictional cooperation between the US and EU on a number of areas. The panelists discussed three of the basic challenges that a CCO faces when he or she is responsible for the compliance program of an organization with cross-jurisdictional regulatory exposure, such as Europe-based swap dealer with a US parent: i) identifying which regulator or regulators have jurisdiction over certain issues, ii) once the regulator(s) with jurisdiction are identified, determining the applicable rules and weeding through the nuances in the definitions embedded in those rules, and iii) knowing when to notify a local regulator of your application of a foreign regulator's requirements to a certain issue, and vice versa.

Toward the conclusion of the session, the panelists discussed some developments in recent CFTC enforcement issues, and cited 'self-reporting' as the single most important element of reducing potential fines for registrants. They also cautioned CCOs to be aware of a recent trend in enforcement cases has been directed at individual registrants for "failure to supervise."

Enforcement: CFTC, NFA, SRO Enforcement and Exams

Moderator: Maureen Guilfoile, Executive Director & Associate General Counsel, CME Group

Speakers: Cynthia Cain Ioannacci, Assistant General Counsel, National Futures Association; Jason Fusco, Assistant General Counsel, Market Regulation, ICE Futures U.S.; Stacie Hartman, Partner, Schiff Hardin, Christian Kemnitz, Partner, Katten Muchin Rosenman; Steven Schwartz, Executive Director – Global Head of Enforcement, CME Group

The last session of the second day provided an in-depth discussion on CFTC and NFA Enforcement trends. The panelists opened by acknowledging the industry-wide issue with 'spoofing' and the recent uptick of CFTC enforcement actions involving this type of trading manipulation. While the panelists do expect to see a decrease in these actions over the next few years due to the significant mitigating actions taken by the Commission on this issue, they did warn of procedural issues with the Courts that could muddle otherwise cut-and-dried findings of criminal spoofing, such as disputes over venue.

The panelists also discussed the CFTC's willingness to concede enforcement actions to NFA when they involve issues that are within the purview of the NFA, such as cases involving supervision failures. The panel also acknowledged the NFA's adoption of a risk-based approach to examinations, and how their exploration into areas such as third-party oversight can lead to enforcement actions for failure to supervise.

In conclusion, the panelists emphasized the three most important things that the CFTC and NFA would like firms to do to avoid severe enforcement actions or fines are: i) self-reporting of issues, ii) the effective remediation of those issues, and iii) the cooperation of parties with their regulator.

Day 3

Swaps: Regulatory Reform, Lessons Learned, and Upcoming Rulemaking

Moderator: Ruth Arnould, Director & Associate General Counsel, Bank of America Merrill Lynch

Speakers: Matthew Danton, Head of Equities Legal Americas, Barclays; Mike Gill, Chief of Staff, Office of Chairman J. Christopher Giancarlo, Commodity Futures Trading Commission; Daniel Glatter, Head of Compliance, BNY Mellon Markets; Carl Kennedy, Of Counsel, Gibson Dunn & Crutcher; Deborah North, Partner, Allen and Overy; Sachiyo Sakemi, Managing Director, BlackRock

The morning session of the final day of the conference focused on the sweeping reform that has taken place in the uncleared swaps market over the last year or two. The biggest of the reforms by far has been the U.S. Qualifying Financial Contract Rules, which will restrict the contractual rights of counterparties in certain swaps or derivatives transactions in the event of a financial collapse of what the rule identifies as a 'global systemically important banking organization' (or a "GSIB"). Most of the panelists agreed that the two biggest challenges in preparing for the upcoming phases of this regulation are: i) identifying the proper counterparties impacted by the rule, and ii) managing the voluminous and manual documentation process associated with the identification process.

The panelists also discussed some recent regulation in the swaps space that present cross-jurisdictional harmonization issues, such as the uncleared margin rules. The panelists indicated that the margin reporting rules differ so greatly between the US and the EU regulatory regimes, that No Action Relief may be required in the near future.

Toward the conclusion of the session, the panelists recognized some positive updates made to the rules governing Swap Execution Facilities, or "SEFs", which have created a more prescriptive, uniform approach to dealing with global market regulations. In addition, the panelists expect to see positive collaboration between the SEC and the CFTC in their review of the Dodd-Frank Act beginning this summer.

Broker Dealers and FCMs: Are Their Regulations Harmonized or Not?

Moderator: Ronald Filler, Professor of Law and Director of Financial Services Law Institute, New York Law School

Speakers: Tammy Botsford, President, FIA Law & Compliance Division, and Executive Director & Assistant General Counsel, J.P. Morgan; Blake Brockway,

Assistant General Counsel, National Futures Association; Steven Lofchie, Partner, Cadwalader, Wickersham & Taft; Michael Macchiaroli, Associate Director, Division of Trading & Markets, Securities and Exchange Commission; Ellen Wheeler, Partner, Foley & Lardner; Bill Wollman, Executive Vice President, Member Regulation—Risk Oversight and Operational Regulation, FINRA

The final session of the conference analyzed various regulations applicable to both broker-dealers and futures commission merchants ("FCMs"). The panel first focused on the broker-dealer space, discussing the SEC's recent best interest fiduciary standard to be applied to broker-dealers. The panelists suggested that FINRA is keen on the SEC's proposal, and has been executing examinations that target conflicts of interest in order to get ahead of the adoption of the SEC's proposal.

The panelists then shifted their focus to the FCM space, and some of struggles the NFA is facing in examining these firms. With regard to examinations of foreign FCMs and other swap dealers, the NFA has found it difficult to assert its jurisdiction over these foreign firms in countries where the NFA is not recognized as a government-backed regulator. The panelists also mentioned that the NFA is dealing with having to share their jurisdictional mandate of supervision claims with other SROs, such as the Chicago Mercantile Exchange, which has recently issued a number of failure to supervise actions against individuals as opposed to firms.

The panelists discussed some areas of harmonization between the two regulatory regimes for broker dealers and FCMs. For example, the CFTC recently gained full jurisdiction over whistleblower claims for securities-based swap dealers, which has always sat squarely within the SEC's jurisdiction. In addition, the NFA has recently followed FINRA's lead in putting more focus into its cybersecurity program by adding a cybersecurity manager to its examination force. Lastly, the panelists touched upon some future potential areas of harmonization between the two regimes, namely their comments on the Liquidity Rule, their review of Dodd-Frank, and their comments on eradicating the WORM requirement for recordkeeping, as all three relate to their respective and overlapping mandates.