Bridging the Week by Gary DeWaal: March 16 - 20 and March 23, 2020 (COVID-19)

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Bridging the Week

- Coronavirus News
- Financial Institutions & Banking
- Corporate & Business Organizations
- All Federal

Monday, March 23, 2020

My View: Since the first edition of what has become Bridging the Week on February 23, 2013, I have tried on an almost weekly basis to summarize legal and regulatory developments that I thought might be of interest to persons involved in the financial services industry, drawing on my own sense of what was important for me to know in my former capacity as Group General Counsel for Fimat/Newedge – one of the world’s largest brokers of exchange-traded derivatives and other financial products – from 1995 through 2012. Where there were particularly significant developments, I also added commentary based on my experience in the form of My View, Legal Weeds, Compliance Weeds or a host of other categories.

Regrettably there is only one major industry development these days and likely for the foreseeable future – the repercussions from the COVID-19 pandemic. For the United States and much of the world, the rapid spread of this virus has created – for recent times – unparalleled social and economic dislocation. COVID-19 has resulted in extraordinary market volatility and prompted financial services firms of all types to disperse most if not all of their employees to remote locations including, in many cases, their homes. Moreover, it is not likely that this dispersion will end anytime soon, given the way that COVID-19 seems to be so easily transmitted from person to person through asymptomatic carriers.
So far, financial services' firms' business continuity plans, as often being adapted on the fly, appear mostly to be working. Formal financial markets, although highly volatile, appear to be functioning well with ordinary settlement and/or clearing occurring. On a systemic basis, so far, the system seems to be holding up.

This does not mean that every market participant is coming through the pandemic in an optimal state. There have already been public reports of at least one major trading firm's failure, and it is probable that other firms may also not survive this period of exceptional market volatility where some expected tried and true correlations among different financial instruments are not occurring.

Having participated in hosted-webinars over the past two weeks with senior staff of the Commodity Futures Trading Commission, the Financial Industry Regulatory Authority, and the National Futures Association, it appears that our US financial services regulators are doing their best to stay on top of rapidly evolving circumstances and showing flexibility in adapting existing rules to accommodate new realities. Regulators have also routinely invited industry persons to approach them if further relief is required.

During these extraordinary times, many law and consulting firms, especially my own – Katten – are producing exceptionally useful and timely summaries of breaking legal and regulatory developments involving the financial services industry and we at Katten are also trying to host timely webinars with regulators too. Therefore, I am not sure my summarizing these same developments on Monday morning of each week - as I ordinarily have done in Bridging the Week for over seven years - provides additional utility at this time and I doubt I can routinely add any unique insights to these matters to make my coverage more compelling.

As a result, I will suspend my regular weekly production of Bridging the Week for the time being, although I will continue to cover anything exceptional through ad hoc editions of Between Bridges. Also I will continue to participate as a contributor to various other Katten publications.

That being said, I do offer the following observations:

It is hard to imagine that the COVID-19 pandemic will not have a profound impact on the financial services industry for a long time. Indeed, it is not even clear that when we return to normalcy – which we will – it will be a normal we are familiar with. The social distancing and shelter in place edicts we are complying with during this episode, will have a profound impact on how we all will work going forward. Moreover, current market developments will ultimately be factored into all risk assessments going forward, potentially increasing the cost of conducting business in general. And unfortunately, there may be more market participants that fail or almost fail, and how those incidents occur, are handled, and impact the broader markets, will be studied and could result in additional regulation to help try to mitigate the fallout from the next major market disruption event.

In addition to being able to reliably access critical systems remotely to conduct daily business and guarding against untoward cyber intrusions, one of the greatest challenges financial industry firms will have for the foreseeable future is supervising remote locations, especially employees interacting with counterparties.
and customers – particularly retail customers. Firms should make clear in writing their expectations of all employees interacting with such persons from their homes or other remote locations and supervisors should stay in contact with such persons regularly – preferably by a video service but at least by telephone. Electronic surveillance should be heightened, if possible, to help detect potentially problematic conduct. Manually generated, regulatorily required records should be collected and reviewed as promptly as feasible under our current, unique circumstances; how such records should be stored must also be thought through to facilitate orderly and prompt retrieval later, if necessary.

Since many rules might be relaxed to accommodate business and it may be tough for employees working remotely to access the support they ordinarily have when working in a company office, it is more important than ever for all financial services businesses’ employees to follow the “grandmother test” in their daily activities as a bedrock standard of conduct: don’t engage in any conduct that you would be embarrassed to explain to your grandmother or kid should it be covered on a front page of a daily newspaper. It’s a simplistic standard, but it works.

For outstanding coverage of breaking information for the foreseeable future, check-in daily to Katten Insights – Publications; click here to access it.

Click here for a Katten overview of recent guidance and relief granted by the CFTC, Securities and Exchange Commission, FINRA and NFA to accommodate various circumstances arising from the COVID-19 pandemic.

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