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Eleven Financial Institutions Pay $700 Million to Settle Recordkeeping and Supervision Violations Related to Off-Channel Business Communications

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On September 27, the Commodity Futures Trading Commission ("CFTC") issued orders to settle charges against 11 major U.S. and international financial institutions and their swap dealer ("SD") and futures commission merchant ("FCM") affiliates registered with the CFTC.

The charges cited widespread use of unapproved communication methods such as personal text, WhatsApp and Signal among front-office personnel, records of which were not adequately maintained, preserved or produced in accordance with CFTC recordkeeping rules, and associated supervision failures.

During the CFTC's investigations, each of the sanctioned entities acknowledged awareness of their front-office and supervisory employees' ubiquitous use of unmonitored platforms for internal and external communications. The CFTC found that each registrant failed to maintain hundreds, if not thousands, of swaps- and commodities-related communications, in violation of CFTC recordkeeping rules. Moreover, the longstanding violations of each registrant's own internal policies and procedures constituted a violation of duty to supervise and, therefore, SDs' and FCMs' management failed to execute their duties to diligently supervise their regulated swaps and commodities businesses. To settle the charges, the registrants paid a collective $700 million and agreed to extensive remedial efforts and additional reporting obligations.

The charges come after one Wall Street SD's $200 million settlement on similar charges in December, and it is expected that the investigations into offline communications will continue. CFTC Acting Director of Enforcement Gretchen

Lowe said: "[t]he Commission continues to focus on the importance of recordkeeping, supervision and other regulatory obligations. Registrants and other market participants subject to the federal commodities laws and regulations are encouraged to examine their own internal controls and supervision to ensure they are in compliance."

The Securities and Exchange Commission ("SEC") on the same day announced entry of orders filing and settling charges against several of these financial institutions and imposed civil monetary penalties for related recordkeeping and supervision violations.

The key takeaways from this CFTC and SEC enforcement sweep are:

- SDs and FCMs must ensure that all communications by their employees and particularly their associated persons and principals in connection with their regulated business must be properly recorded.

- The use of WhatsApp and other communication devices are not in and of themselves prohibited. It is the fact that these devices do not offer a way to reliably record and preserve these communications and, therefore, communications via these devices could not be produced to the CFTC when requested.

- SDs' and FCMs' internal policies and procedures must be revised to ensure compliance with CFTC regulations, and SDs' and FCMs' relevant personnel must be periodically trained to ensure compliance.