SHEARMAN & STERLING

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FINANCIAL REGULATORY DEVELOPMENTS FOCUS

In this week's newsletter, we provide a snapshot of the principal United States, European and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructure providers, asset managers and corporates.

Click here if you wish to access our Financial Regulatory Developments website.

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Bank Prudential Regulation & Regulatory Capital

Federal Reserve Vice Chairman Quarles Speaks on Improving Effectiveness of Post-Crisis Regulation

On January 19, 2018, Vice Chairman of the U.S. Board of Governors of the Federal Reserve System, Randal Quarles, delivered remarks at the American Bar Association Banking Law Committee's annual meeting. In his remarks, Mr. Quarles discussed his approach as Vice Chair of Supervision and outlined a number of items that were areas of focus. Mr. Quarles noted that the post-crisis regulatory framework was largely complete—with the exception of the implementation of the Basel III framework—and noted that this provided an opportunity to reflect on these regulations and assess their utility and move towards efficient and transparent regulation. Mr. Quarles reiterated the need to reduce the regulatory burden for smaller financial institutions and echoed prior comments from Federal Reserve Board Chairman-nominee Jerome Powell that key regulatory areas that need improvement include resolution planning, stress testing and simplification of the Volcker Rule. Specifically, he noted that the relevant agencies have begun work on a proposal to streamline the Volcker Rule and "congeal around a thoughtful Volcker rule 2.0."

Mr. Quarles also discussed a few emerging areas for consideration, including: (i) tailoring regulation to match an institution's size, footprint, risk profile and business model; (ii) a re-evaluation of loss absorbency requirements; (iii) a recalibration of the leverage ratio; and (iv) the Federal Reserve Board's framework for control determinations under the Bank Holding Company Act, which he generally views as too opaque.

The full text of Vice Chairman Quarles's speech is available at:
https://www.federalreserve.gov/newsevents/speech/quarles20180119a.htm.

US Federal Reserve Board Clarifies Regulatory Requirements for Foreign Banking Organizations

On January 18, 2018, the U.S. Federal Reserve Board issued a notice finalizing its revisions to the Form FR Y-7 (Annual Report for Foreign Banking Organizations), regarding how a foreign banking organization should certify its compliance with U.S. risk committee and home country capital stress testing requirements under Regulation YY. The new reporting forms require institutions to certify compliance with both of the requirements via a Yes/No check-box feature on the form. Originally proposed on December 2, 2015, the final notice adopts the revisions to the FR Y-7 and related instructions to the reporting form as proposed, except that the revisions are now effective beginning with FR Y-7 reports for fiscal year-ends that end on or after March 1, 2018.

The notice also provides clarification around several issues related to interpretation of Regulation YY, including composition of the U.S. Risk Committee and compliance with home country capital stress testing requirements. Specifically, the notice states that FBOs are not required to create a special US risk committee comprised of members of the FBO's board of directors, but that the FBO should "ensure that the FBO's board of director or a committee comprised of members of the FBO's board of directors has primary responsibility for oversight of the risks of the combined US operations." For FBOs with a two-tier board structures, the notice clarifies that a committee of either the supervisory board or the management/executive board (or a combination thereof) could be members of the committee that oversees US risk for purposes of complying with Regulation YY. The notice further states that certification of compliance with home country capital stress testing requirements can be based on satisfactory completion of the home country Internal Capital Adequacy Assessment Process (ICAAP) if an ICAAP satisfies the underlying requirements for a capital stress test, including all applicable information requirements in Regulation YY.

Moreover, the notice reiterates the Federal Reserve Board's expectation that an FBO be subject to a stress testing regime that includes an annual supervisory stress test or annual supervisory evaluation of the FBO's internal stress test. The notice explicitly states that bi-annual stress testing would not satisfy the Regulation YY requirement. The notice also clarifies that, with regard to the liquidity stress testing requirements of Regulation YY, a foreign banking

organization that does not conduct consolidated liquidity stress testing using the three specific planning horizons in Regulation YY may choose to meet the requirement by providing an internal liquidity stress test for just the combined U.S. operations. A foreign banking organization that does not meet the liquidity stress test reporting requirements must limit net aggregate amount by the parent or other non- U.S. affiliates to the U.S. operations to 25% or less of third party liabilities of the combined U.S. operations. The notice also provides guidance regarding the confidentiality of information submitted as part of the FR Y-7 report.

The final notice is available at: https://www.federalreserve.gov/reportforms/formsreview/FR%20Y-6%20FR%20Y-7%20FR%20Y-10%20FR%20Y-10E%20FFRN01182018.pdf.

House Financial Services Committee Advances 15 Bills

On January 18, 2018, the U.S. House Financial Services Committee announced that it had advanced 15 bills, many of which would alter the regulatory framework for financial institutions. This group of bills also included a number of bills based upon certain sections of the omnibus Financial CHOICE Act passed by the U.S. House of Representatives in July 2017, which may be indicative of the Financial Services Committee's view regarding the likelihood of a comprehensive bill's passage in the Senate. Some of the bills that were passed by the Financial Services Committee include:

I. the Community Financial Institution Exemption Act (H.R. 1264), which would exempt, with certain exceptions, all insured depository institutions or credit unions with less than $50 billion in consolidated assets from U.S. Consumer Financial Protection Bureau rules and regulations;

II. the Federal Savings Association Charter Flexibility Act of 2017 (H.R. 1426), which would give certain federal savings associations the same rights and privileges as national banks supervised by the U.S. Office of the Comptroller of the Currency;

III. a pair of bills that amend the Truth in Lending Act (the Portfolio Lending and Mortgage Access Act (H.R. 2226) and the Housing Opportunities Made Easier Act (H.R. 2255));

IV. the Financial Stability Oversight Council Improvement Act (H.R. 4061), which would require that the FSOC evaluate whether heightened prudential standards or other rules and regulations optimize risk mitigation when considering whether a financial institution should be supervised by the U.S. Board of Governors of the Federal Reserve System;

V. the Alleviating Stress Test Burdens to Help Investors Act (H.R. 4566), which would exempt nonbank financial institutions from the requirements of stress testing, unless the institution is currently under the supervision of the Federal Reserve Board, and also empowers the Federal Reserve Board to limit stress testing requirements for the nonbank financial institutions that it does supervise;

VI. the Comprehensive Regulatory Review Act (H.R. 4607), which would require that each US federal financial regulator conduct a review every seven years of all rules and regulations promulgated by the respective agency since 2006 in order to tailor existing rules and regulations, or identify those that may be unnecessary or outdated;

VII. the Community Bank Reporting Relief Act (H.R. 4725), which would provide a reduced regulatory reporting requirement for certain depository institutions with consolidated assets of $5 billion or less; and

VIII. the Small Bank Holding Company Relief Act (H.R. 4771), which would raise the threshold of the Small Bank Holding Company Policy Statement from $1 to $3 billion.

The Financial Services Committee announcement and links to the full text of the bills referenced above are available at: https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=402932.

European Commission Reports Steady Downward Trend in EU Banks' Non-performing Loans

On January 18, 2018, the European Commission has published a Communication to the European Parliament, the Council of the European Union and the European Central Bank, setting out its first progress report on the implementation of the "Action Plan To Tackle Non-Performing Loans in Europe" that was adopted by the Council in July 2017. The Communication discusses addressing NPLs as part of risk reduction in the financial sector and reports that the general improvement in NPL ratios over recent years continued in 2017. The ratio

of NPLs is at its lowest level since Q4 2014. The Communication concludes by stressing the importance of maintaining the pace of NPL reduction and the need, not only for continued action by individual banks and by Member States, but also for concerted action at EU level by the Commission and other EU institutions, including the ECB.

A Commission Staff Working Document, published jointly with the Communication, provides further detail on the workstreams identified as necessary to deliver the Action Plan and on developments in selected Member States.

The Commission expects to issue its next progress report by March 2018. It also plans to publish, in Spring 2018, a package of policy measures, including legislative proposals, to deliver those parts of the Action Plan for which it has direct responsibility. The package will include measures for: establishing a blueprint for national Asset Management Companies in the event of a bank failure under the EU Bank Recovery & Resolution Directive; developing secondary markets for NPLs; enhancing the protection of secured creditors; introducing statutory prudential backstops to prevent the risk of under-provisioning of NPLs; and improvements to data availability and comparability as regards NPLs.

The Commission Communication is available at: https://ec.europa.eu/info/banking-and-finance-website-notice-users_en and the Commission Staff Working Document is available at: https://ec.europa.eu/info/sites/info/files/180118-non-performing-loans-staff-working-document_en.pdf.

EU Authority Publishes Guidelines on Uniform Disclosure of IFRS 9 Transitional Arrangements

On January 12, 2018, the European Banking Authority published a final Report and final Guidelines on uniform disclosures under the Capital Requirements Regulation regarding the transitional period for mitigating the impact of the introduction of International Financial Reporting Standard 9 (known as IFRS 9) on own funds.

IFRS 9, which applies for accounting periods beginning January 1, 2018, will require the measurement of impairment loss allowances to be based on an expected credit loss accounting model rather than on an incurred loss accounting model. The application of IFRS 9 could lead to a sudden significant increase in expected credit loss provisions and consequently to a sudden decrease in an institution's Common Equity Tier 1 capital. For this reason, institutions that prefer not to recognize the full impact of IFRS 9 (or analogous ECL models) immediately have the option of phasing in implementation of IFRS 9 over a transitional period.

IFRS 9 is being implemented in the EU through a regulation amending the CRR which sets out transitional provisions. The amending Regulation applied directly across the EU from January 1, 2018. A firm that uses the transitional arrangements must publicly disclose its own funds, capital ratios and leverage ratios both with the application of the transitional arrangements and also on a "fully-loaded" basis, i.e., as if the transitional arrangements had not been applied.

The EBA's Guidelines set out a uniform disclosure format to enable institutions to make IFRS 9 (or analogous ECL) disclosures in a consistent and comparable way during the transitional period. The Guidelines will be published on EBA's website, and national regulators must then notify the EBA within two months if they intend to comply with the guidelines. These notifications will also be published on the EBA's website.

The final Guidelines are available at: http://www.eba.europa.eu/documents/10180/2082000/Final+Report+on+Guidelines+on+uniform+disclosure+of+IFRS9+transitional+arrangements+%28EBA-GL-2018-01%29.pdf and the CRR IFRS amending Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2395&from=EN.

UK Financial Conduct Authority to Allow 90-Day Unbreakable Deposits for Client Money

On January 22, 2018, the UK Financial Conduct Authority published a Policy Statement and final rules to introduce changes to its client money rules to amend the existing 30-Day Rule, under which firms are prevented from placing client money in bank accounts with unbreakable terms of longer than 30 days. The client money rules require firms to deposit client money in an account opened with an authorized bank, a central bank or in a qualifying money market fund. An unbreakable deposit is one where the firm placing the deposit has no contractual ability to request the return of the monies prior to the end of the agreed term.

The rule changes have been made following feedback from firms that banks have been increasingly reluctant to provide 30-day unbreakable deposits. This reluctance appears to have been due to the interaction of the client money and prudential regimes. All client money is subject to the Liquidity Coverage Ratio, which requires banks to have highly liquid assets to cover 100% of their potential net cash outflows over 30 days. Unbreakable deposits of a maximum of 30 days are therefore capital inefficient for banks.

While the FCA remains of the view that placing client money in unbreakable deposits for long periods is incompatible with the purpose of the client money regime, the rule changes will allow firms to use 31-90 day unbreakable deposits, provided that they comply with certain conditions such as new record keeping requirements. The FCA consulted on the proposals in August 2017 and, following positive responses to that consultation, is implementing the rule changes as consulted on. The new rules apply from January 22, 2018.

The Policy Statement (FCA PS18/2) is available at: https://www.fca.org.uk/publication/policy/ps18-02.pdf.

UK Prudential Regulation Authority Delays Implementation of Pillar 2 Reporting Requirements

On January 17, 2018, the U.K. Prudential Regulation Authority has announced that it is postponing by six months the introduction of a new liquidity reporting template, PRA110. PRA110 is intended to capture information on cashflow mismatch risk within the Pillar 2 framework. The Capital Requirements Directive gives national regulators discretion to set additional Pillar 2 liquidity requirements. The Pillar 2 framework involves additional capital requirements set through regulatory discretion and complements the Pillar 1 Liquidity Coverage Ratio requirements, by capturing those liquidity risks that are either not captured or not fully captured under Pillar 1.

The PRA consulted in July 2017 on a draft liquidity reporting template for CFMR, to be numbered PRA110. PRA110 will build on the EBA's maturity ladder reporting template, which will apply from March 2018, by including additional columns and rows to capture additional information. The PRA originally proposed that the PRA110 template would be implemented on January 1, 2019 and that, on implementation of PRA110, it would terminate the old FSA047 and FSA048 returns.

Having considered the responses to its July 2017 consultation, the PRA proposes to postpone the introduction of PRA110 to July 1, 2019. This will mean that the termination of forms FSA047 and FSA048, which is linked to the introduction of PRA110, is also postponed by six months. Interim reporting which was scheduled to start in March 2018, with the introduction of the EBA's maturity ladder reporting requirements, will also be delayed by six months, to September 2018.

The PRA announcement is available at: https://www.bankofengland.co.uk/prudential-regulation/regulatory-reporting/regulatory-reporting-banking-sector.

Consumer Protection

EU Authority Considers Product Intervention for Contracts for Difference and Binary Options

On January 18, 2018, the European Securities and Markets Authority has issued a call for evidence on the possible use of its product intervention powers under the Markets in Financial Instruments Regulation to impose restrictions and/or prohibitions on the marketing, distribution and sale of contracts for differences and binary options to retail investors. A CFD is a derivative (other than an option, future, swap or forward rate agreement) which gives the holder a long or short exposure to fluctuations in the price, level or value of an underlying, irrespective of whether it is traded on a trading venue. A binary option is a derivative that only provides for payment at its close-out or expiry. Its payment is either: (i) a predetermined fixed amount if the underlying of the derivative meets one or more predetermined conditions; or (ii) zero or another predetermined fixed amount if the underlying of the derivative does not meet one or more predetermined conditions. Both CFDs and binary options must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event. Both CFDs and binary options have given rise to significant investor protection concerns, due to their complexity, the lack of transparent information at the point of sale, the risk of significant loss for investors and the deployment of aggressive marketing techniques by providers and distributors of the products.

The call for evidence follows a statement by ESMA in December 2017, announcing that supervisory convergence work and measures imposed by national regulators in this area had not been enough to control or reduce investor protection concerns. Under MiFIR, ESMA has the power to impose temporary prohibitions or restrictions on certain financial instruments, financial activities or practices when, among other conditions, the exercise of ESMA's power addresses a significant investor protection concern in the Union. ESMA can exercise its power for renewable temporary periods of up to three months.

ESMA is considering using its product intervention power to impose a complete ban on the marketing, distribution and sale of binary options to retail investors. ESMA considers that any restrictions other than a prohibition would not be sufficient to address the significant investor protection concerns that arise from inherent features in these products, such as the very short duration of binary options contracts and their pricing structure.

ESMA has also long had concerns about the marketing, distribution and sale of CFDs (including rolling spot forex) to retail investors. It proposes a number of restrictions, namely leverage limits (variable, according to the historical price volatility of underlying asset types), a margin close-out rule, negative balance protection, restrictions on the extent to which product providers can offer incentives to would-be investors and a requirement for a standardized risk warning on all communications and information relating to these products. Where the underlying asset for a CFD is a cryptocurrency, however, ESMA is considering more stringent restrictions or even prohibition. ESMA is still conducting work on how cryptocurrencies fit into the MiFID II framework as financial instruments.

Responses to the call for evidence are requested by February 5, 2018. Once finalized, temporary restrictions or prohibitions must be complied with by all market participants in the EU.

The U.K. FCA has issued a statement publicizing ESMA's call for evidence.

ESMA's call for evidence is available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-904_call_for_evidence_-_potential_product_intervention_measures_on_cfds_and_bos_to_retail_clients.pdf.

The FCA statement on the call for evidence is available at: https://www.fca.org.uk/news/news-stories/ESMA-call-for-evidence-temporary-product-intervention-measures-for-CFD-and-binary-options.

ESMA's December 2017 statement is available at: https://www.esma.europa.eu/sites/default/files/library/esma71-99-910_pi_statement_december_2017.pdf.

ESMA's Q&A on its MiFIR product intervention powers is available at: https://www.esma.europa.eu/policy-activities/mifid-ii-and-investor-protection/product-intervention.

Financial Crime

Final EU Guidelines for Payment Service Providers Relating to Electronic Fund Transfers

On January 16, 2018, the Joint Committee of the European Supervisory Authorities published final Guidelines on preventing terrorist financing and money laundering in electronic fund transfers under the EU Wire Transfer Regulation. The Wire Transfer Regulation, which applied from June 26, 2017, requires payment service providers, among other things, to have effective procedures to detect transfers of funds that lack the required information on the payer and the payee and to determine whether to execute, reject or suspend a transfer of funds that lacks that information.

The Guidelines set out the factors that payment service providers should consider when establishing and implementing procedures to detect and manage transfers of funds which do not have the required payer and payee information to ensure that their procedures are effective. The Guidelines also specify what a payment service provider should do to manage the risk of money laundering or terrorist financing where that information is missing or incomplete. Further, the Guidelines will assist payment service providers to determine which fund transfers fall within the scope of the Wire Transfer Regulation and how the exemptions might apply. National regulators are required to use the Guidelines when assessing the adequacy of a payment service provider's procedures.

The Guidelines will apply to all payment service providers and intermediary payment service providers as well as their national regulators from July 16, 2018.

The Guidelines are available at: http://www.eba.europa.eu/documents/10180/1969371/Joint+Guidelines+to+prevent+terrorist+financing+and+money+laundering+in+electronic+fund+transfers+%28JC-GL-2017-16%29.pdf/49f8aa4b-6d6d-4ea9-a84d-bc9a6eba75eb.

Financial Action Task Force Reports on Financing of Recruitment to Terrorist Organizations

On January 12, 2018, the Financial Action Task Force published a Report on the financing of recruitment for terrorist purposes, as part of its strategy on combating terrorist financing. The Report has been compiled using input from relevant authorities and country experts from jurisdictions within the FATF Global Network, including the Asia Pacific, Eurasian, Middle-East and North African regions.

The Report examines the typical methods of recruitment to terrorist organizations and the costs associated with those methods. Recruitment methods vary from region to region. Techniques include recruitment via religious groups in some regions and online recruitment via social media in others. The Report also presents case study data on the sources of funds available to terrorist recruiters and the general expenditures involved in the recruitment process.

The Report concludes by recommending improved inter-agency and international co-operation to share information and analyze suspected recruiters and financial supporters of terrorist organizations. The Report

recommends that national operational and security agencies engage more with the private sector, non-profit organizations and social media and other internet providers, by providing better contextual information and guidance to enable those providers to identify the financial flows associated with terrorist recruitment.

The Report is available at: http://www.fatf-gafi.org/publications/methodsandtrends/documents/financing-recruitment-terrorist-purposes.html.

MiFID II

Final EU Regulations on the Scope of the Consolidated Tape for Non-Equity Financial Instruments

On January 17, 2018, a Commission Delegated Regulation amending the Regulatory Technical Standards on authorization, organizational requirements and the publication of transactions for data reporting services providers under the revised Markets in Financial Instruments Directive was published in the Official Journal of the European Union.

MiFID II requires consolidated tape providers to collect post-trade information published by trading venues and approved publication arrangements and to consolidate this into a continuous live data stream made available to the public, both for equity instruments and non-equity products.

The amending Regulation adds provisions to the existing RTS to set out the scope of the consolidated tape for non-equity products (i.e., bonds, structured finance products, emission allowances and derivatives). In particular, the amending Regulation:

I. permits non-equity CTPs to specialize in one or more asset classes to increase the likelihood of a viable business case for non-equity consolidated tape provision;

II. specifies the APAs and trading venues that have to be included in the non-equity consolidated tape, based on the required consolidated tape coverage ratio of 80% of all transactions published in an asset class in the EU; and

III. requires CTPs to reach minimum coverage ratios by January 1, 2019.

The amending Regulation applied from January 3, 2018. However, the provisions relating to CTPs will apply from September 3, 2019. The amending Regulation does not differ substantively from the final draft RTS submitted to the European Commission on March 31, 2017.

The amending Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0063&from=EN.

EU Trading Venues and CCPs Exempted from Exchange-Traded Derivatives Open Access Rules

On January 9, 2018, ESMA published a list of trading venues exempt from the open access requirements of MiFIR under transitional arrangements for exchange-traded derivatives under the “de minimis” principle. Various national regulators have also delayed the coming into effect of the open access requirements of MiFID II for clearing houses.

MiFIR requires a trading venue to provide open and non-discriminatory access to a CCP so that a CCP can clear trades concluded on a trading venue of their choice, which will in turn allow the members of a trading venue to select the CCP they wish to use for clearing. There is a reciprocal requirement on CCPs to provide open and non-discriminatory access to a trading venue that wishes to clear financial instruments through a particular CCP. These provisions are controversial since they mean that valuable intellectual property and IT systems developed by exchanges effectively must be made available to competitors or new market entrants. It has been argued that the open access requirements make the EU unattractive as a location for exchange

businesses due to commercial disadvantages that result for those exchanges which have successfully invested in innovation.

MiFIR provides for a transitional opt-out from the open access requirements for trading venues and clearing houses in relation to ETDs provided that certain criteria are met. ESMA's list specifies four trading venues from Spain, Poland, Norway and Greece that have had their application for exemption approved and one from Sweden whose approval is pending. The four trading venues — MEFF Sociedad Rectora del Mercado de Productos Derivados S.A.U., Giełda Papierów Wartościowych w Warszawie S.A., Oslo Børs ASA and Athens Exchange S.A. — are exempt from the MiFIR open access requirements until July 3, 2020.

The U.K. FCA issued a statement on January 3, 2018 stating that it had agreed transitional arrangements for both ICE Futures Europe and the London Metal Exchange. Neither of these trading venues are required to consider open access requests relating to ETDs until the expiry of the transitional period on July 3, 2020. It has also been reported that the Euronext derivatives trading venues in France, Belgium and Portugal have also been granted the same exemption and that approval from the Dutch regulators is pending. The UK and Euronext trading venues have not yet been added to ESMA's list.

Further, the Bank of England has approved the applications of ICE Clear Europe and LME Clear Limited for exemptions from the open access provisions imposed on clearing houses. The German regulator, BaFin, has granted an exemption to Eurex Clearing AG too. These exemptions apply to open access requests from trading venues for ETDs until July 3, 2020. The European Commission published a Report in September 2017 to the European Parliament and the Council recommending that ETDs do not need to be excluded from the scope of the provisions of MiFIR on a Europe-wide basis.

The ESMA list is available at: https://www.esma.europa.eu/press-news/esma-news/esma-issues-list-trading-venues-temporarily-exempted-open-access-under-mifir.

The FCA's statement is available at: https://www.fca.org.uk/news/statements/statement-transitional-arrangements-trading-venues-under-mifir-article-542.

The Bank of England's statements is available at: https://www.bankofengland.co.uk/financial-stability/financial-market-infrastructure-supervision.

BaFin's statement is available at:
https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Meldung/2018/meldung_180102_Eurex_en.html.

Securities

EU Secondary Legislation under the Benchmark Regulation Published

On January 17, 2018, four Commission Delegated Regulations supplementing the Benchmark Regulation were published in the Official Journal of the European Union. The Benchmark Regulation regulates the provision of benchmarks, contributions of data to a benchmark and the use of benchmarks within the EU. It sets out the authorization and registration requirements for benchmark administrators, including third country entities, and stipulates requirements for governance and control of administrators. The Benchmark Regulation establishes different rules for different categories of benchmarks, depending on the risks involved, and imposes additional requirements on benchmarks considered to be critical. It also sets out the powers of national regulators to mandate, under certain conditions, contributions to or the administration of a critical benchmark.

The four Delegated Regulations are:

I. Delegated Regulation (2018/65) on the technical elements of definitions used in the Benchmark Regulation, in particular, the definitions of "making available to the public" and "administering of arrangements for determining a benchmark.

II. Delegated Regulation (2018/67) on the conditions for national regulators to assess the impact of the cessation of or change to an existing benchmark that no longer complies with the Benchmark Regulation. The Regulation sets out in detail the conditions that must exist for a national regulator to determine that the cessation or changing of an existing benchmark could result in a force majeure event, frustrate or otherwise breach the terms of a financial instrument or the rules of an investment fund referencing an existing benchmark.

III. Delegated Regulation (2018/66) on how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed for the purposes of categorizing a benchmark. The Benchmark Regulation requires benchmarks to be categorized as critical, significant or non-significant and applies different requirements according to those categories. A key factor for that categorization is the total value of financial instruments, financial contracts or investment funds referencing a benchmark. The Delegated Regulation sets out required methods for calculating the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds to ensure that benchmarks are categorized in a consistent manner across the EU.

IV. Delegated Regulation (2018/64) on the criteria to be applied by national regulators when assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States. The Benchmark Regulation requires the European Commission to establish and review at least every two years a list of critical benchmarks provided by administrators located within the Union. For a benchmark to be considered critical, it must meet certain conditions. One condition is whether the cessation of or change to a benchmark would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member State. The Delegated Regulation provides the criteria for national regulators to apply when assessing whether a benchmark meets this particular condition.

The Benchmark Regulation applied from January 1, 2018. These four Delegated Regulations will enter into force on February 6, 2018 and will be directly applicable across all EU Member States.

Delegated Regulation (2018/65) is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0065&from=EN.

Delegated Regulation (2018/67) is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0067&from=EN.

Delegated Regulation (2018/66) is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0066&from=EN.

Delegated Regulation (2018/64) is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0064&from=EN.

Upcoming Events

February 5, 2018: Public hearing on EBA discussion paper on EU implementation of the revised market risk and counterparty credit risk frameworks

February 19, 2018: PRA and FCA New Bank Start-up Unit Seminar

February 19, 2018: Joint EBA and ESMA public hearing on consultations on draft RTS and ITS under the STS Regulation

March 22, 2018: U.K. Government's second annual International Fintech Conference

Upcoming Consultation Deadlines

January 29, 2018: European Commission legislative proposals for enhanced powers for ESAs and the European Systemic Risk Board

January 29, 2018: European Commission proposed Regulation moving the EBA to Paris due to Brexit

January 31, 2018: EBA consultation on Pillar 2 draft Guidelines

January 31, 2018: EBA consultation on Amended Technical Standards for Benchmarking of Internal Models under CRD

February 2, 2018: Bank of England consultation: Procedure for the Enforcement Decision Making Committee

February 2, 2018: FSB consultations on proposed guidance on principles of bail-in execution and on the funding strategy elements of an implementable resolution plan

February 5, 2018: Basel Committee consultation on a proposed technical amendment to the Net Stable Funding Ratio

February 5, 2018: FCA consultation: Industry Codes of Conduct and Discussion Paper on FCA Principle 5

February 9, 2018: EBA consultation on draft RTS on the methods of prudential consolidation under the CRR

February 15, 2018: Comments due on the Federal Reserve's proposed guidance on supervisory expectations for boards of directors and its proposed new rating system for large financial institutions

February 21, 2018: FCA consultation on transitioning FCA solo-regulated firms and individuals to SM&CR (CP 17/40)

February 21, 2018: FCA consultation on transitioning insurers and individuals to SM&CR (CP 17/41)

February 21, 2018: FCA consultation on the duty of responsibility for insurers and FCA solo-regulated firms under the SM&CR (CP 17/42)

February 21, 2018: PRA consultation - extending the SM&CR to insurers (CP 28/17)

February 23, 2018: European Commission proposals to revise the prudential regime for investment firms

February 26, 2018: European Commission consultation on SME listing

February 27, 2018: PRA consultation on authorization and supervision of international banks (CP29/17)

February 27, 2018: PRA consultation on authorization and supervision of international insurers (CP30/17)

February 28, 2018: European Commission consultation on supervisory reporting requirements

February 28, 2018: ESMA consultation on draft guidelines on the requirement for CCPs to adopt anti-procyclicality margin measures

March 5, 2018: Comments to Federal Reserve Board's Proposed Regulation M Revisions due

March 5, 2018: Comments to Federal Reserve Board's Proposed Call Report Revisions due

March 6, 2018: PRA consultation on proposed updates to the Pillar 2 reporting requirements

March 6, 2018: PRA consultation on model risk management principles for stress testing

March 9, 2018: Basel Committee discussion paper on the regulatory treatment of sovereign exposures

March 9, 2018: ESMA consultation on draft RTS under the new Prospectus Regulation (ESMA31-62-802)

March 15, 2018: Comments to Federal Reserve Board’s proposed guidance clarifying risk management supervisory expectations for large financial institutions due

March 15, 2018: EBA Discussion Paper on EU implementation of the revised market risk and counterparty credit risk frameworks

March 15, 2018: EBA consultation on draft RTS for risk retention under STS Regulation

March 15, 2018: EBA consultation on draft RTS on homogeneity of underlying exposures in STS securitizations under the STS Regulation

March 19, 2018: ESMA consultation on draft technical standards on the content and format of the “Simple, Transparent and Standardized” notification under the STS Regulation

March 19, 2018: ESMA consultation on draft technical standards on disclosure requirements, operational standards, and access conditions under the STS Regulation

March 19, 2018: ESMA consultation on draft technical standards on third-party firms providing STS verification services under the STS Regulation

March 23, 2018: Basel Committee consultation on revised principles for supervisory and bank stress testing

April 9, 2018: PRA consultation on MREL reporting requirements

THIS NEWSLETTER IS INTENDED ONLY AS A GENERAL DISCUSSION OF THESE ISSUES. IT SHOULD NOT BE REGARDED AS LEGAL ADVICE. WE WOULD BE PLEASED TO PROVIDE ADDITIONAL DETAILS OR ADVICE ABOUT SPECIFIC SITUATIONS IF DESIRED. IF YOU WISH TO RECEIVE MORE INFORMATION ON THE TOPICS COVERED IN THIS PUBLICATION, YOU MAY CONTACT YOUR USUAL SHEARMAN & STERLING REPRESENTATIVE OR ANY OF THE FOLLOWING:

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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