OnPoint

Dechert LLP

Update on UK and European Regulatory Developments

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Update on UK and European Regulatory Developments

Part A - Regulation of Financial Markets

Mandatory Central Counterparty Clearing of OTC Derivatives

Jurisdiction: EU

Stage and Timing

The European Market Infrastructure Regulations (EMIR) came into force on 16 August 2012.

For the clearing obligation to apply, clearing houses must be authorised for clearing and classes of derivatives must be designated by ESMA as subject to the clearing obligation. Products which are currently cleared by clearing houses will be the first to be designated. ESMA has stated that the the first clearing obligation will not apply before June 2014, and could be as late as July 2015.

ESMA's latest estimate for the date the reporting requirements will apply to all asset classes is February 2014. ESMA has requested from the Commission a one-year delay for reporting of exchange-traded derivatives, although the Commission has not confirmed that it will grant this.

The final risk mitigation rules came into force on 15 September 2013.

Impact and Considerations

The Regulations introduce mandatory clearing of specified classes of OTC derivatives via one or more central counterparties (clearing houses) which will be authorised by an EU regulator, and mandatory clearing of all derivative trades to a trade repository.

Recent Developments

ESMA regularly updates its Q&A. These were last updated on 5 August 2013.

ESMA has published a consultation on contracts which have a "direct, substantial and foreseeable effect within the EU". Under EMIR, the clearing and risk mitigation obligation will apply to contracts between two third country entities, provided that the contract has a direct, substantial and foreseeable effect within the EU. From the consultation, the possible scope of this provision is where (i) one of the two non-EU counterparties is substantially guaranteed by an EU financial counterparty or (ii) both non-EU counterparties execute transactions via their EU branches.

ESMA has published its "technical advice" to the Commission on the "equivalence" to EMIR of the rules relating to clearing, risk mitigation and reporting of OTC derivatives in the US and other jurisdictions. In brief summary, ESMA has determined that the following rules are equivalent: the clearing obligation, timely confirmation (save for the obligation to report unconfirmed trades), portfolio reconciliation and portfolio compression, and that the following rules are not equivalent: reporting and dispute resolution.

The International Organization of Securities Commissions (IOSCO) and the Basel Committee on Banking Supervision (BCBS) published on 2 September 2013 their report on margin requirements for non-centrally cleared derivatives. The report gives an indication of the rules which the Commission will adopt in due

course. Main points to note are that (i) physically settled FX forwards and swaps are out of scope; (ii) the margin requirements will only apply to financial firms and "systemically important non-financial entities" (to be defined), (iii) there will be a threshold of euro50m for the exchange of initial margin (based on all the OTC derivatives between the two entities, and their affiliates) and (iv) there will be a requirement for daily variation margin.

ISDA has published the following EMIR related protocols:

- EMIR NFC Representation Protocol. This is for financial entities to assist classifying their counterparties as "NFC+" or "NFC-".
- EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol. This provides a framework for parties to meet EMIR's portfolio reconciliation and dispute resolution requirements.
- Dodd-Frank March 2013 Protocol to EMIR Top Up Agreement. This allows parties to make additions to the Dodd-Frank Protocol as an alternative to using the EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol.
- Reporting Protocol. This contains a counterparty's consent to the disclosure of information (such as a party's identity) required under EMIR and more generally.
- Reporting Guidance Note. This includes examples of language which parties can use in a bilateral context to effect their EMIR reporting obligations, including appointing the other party or a third party to perform the reporting.

Recommended Actions

Confirm that existing procedures meet the EMIR risk mitigation requirements. Check the status of funds and other clients under EMIR and plan accordingly.

Current Key Documents and Further Guidance

- The Commission's derivatives page, including link to EMIR
- ESMA's technical standards
- The FCA's EMIR website
- The Commission's EMIR Q&As
- ESMA's Q&As
- ESMA's discussion paper on technical standards relating to classes of derivatives which are subject to the clearing obligation

Review of the Market Abuse Directive

Jurisdiction: EU

Stage and Timing

The Commission published a proposal to revise the Market Abuse Directive (MAD II) on 20 October 2011. It consists of the Market Abuse Regulation (MAR) and a supplementing EU Directive on criminal sanctions for insider dealing and market manipulation (CSMAD). The UK government has for present exercised its discretion not to opt in to CSMAD.

The European Parliament published its adopted version of MAR on 10 September 2013. Final adoption of MAR awaits the final agreement on MiFID II. MAR will apply 24 months after its entry into force, which indicates an implementation date no earlier than 2015.

Impact and Considerations

The Commission intends that the scope of the existing market abuse regime will be extended to multilateral trading facilities (MTFs) and organised trading facility (OTFs), as well as regulated markets. Also in scope are related financial instruments traded on an OTC basis which can have an effect on instruments traded on a trading venue. Under the existing regime, the market integrity and transparency rules apply to commodity derivatives markets, but not to the underlying markets. The Commission intends that MAR will

govern transactions or behaviour in the underlying spot markets which are related to, and have an effect on, the financial and derivative markets which are within the scope of MAR. The trading of emission allowances will also fall within the scope of MAR.

Recommended Actions

Prior to adoption, firms will need to identify relevant instruments in scope and undertake a full compliance review of market abuse procedures, including reporting procedures.

Current Key Documents and Further Guidance

- Current draft of CSMAD
- Current draft of MAR

Financial Transactions Tax

Jurisdiction: EU

Stage and Timing

The Commission adopted its proposal for a Directive on a financial transaction tax on 14 February 2013.

Impact and Considerations

The financial transaction tax (FTT) may apply to transactions in financial instruments, (such as bonds, shares, derivatives and fund units) OTC or on a market to which a financial institution established in an EU Member State is a party, and where at least one party to the transaction is established in an EU Member State. Financial institutions include UCITS and AIFs. The rates of FTT proposed are at least 0.1% of the consideration (for shares and bonds) and 0.01% of the notional amount (for derivatives). Securities issues are exempt. As drafted, the proposal has very wide extra-territorial effect, applying to transactions over instruments issued in participating EU Member States – so would cover a transaction with a UK bank over a French issued bond.

The UK is not participating in the Directive. The UK government has mounted a legal challenge to the Directive at the European Court of Justice on the basis of the Directive's extra-territorial effect. The Legal Service of the European Council has also recently challenged the legality of the proposal.

Due to the lack of EU consensus, 11 EU countries have been authorised by the "enhanced co-operation" procedure to establish their own FTT.

If implemented, the legislation will apply from 31 December 2014. However, much uncertainty remains as to if or when the FTT will be implemented in Europe.

Current Key Documents and Further Guidance

- The Commission's proposal
- Parliament's legislative resolution with amendments to the proposal

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Part B - Regulation of Investment Management

Alternative Investment Fund Managers Directive

Jurisdiction: EU

Stage and Timing

Implementation of the Directive by Member States was required by 22 July 2013. The Level 2 Regulation applied from the same date.

Impact and Considerations

The Directive affects all EU managers of funds other than UCITS funds, and all non-EU managers of funds seeking to market in the EU (regardless of whether the fund is based in or outside the EU).

Recent Developments

At **EU** level:

- ESMA has published guidelines on the AIFM Directive's reporting obligations.
- The regulatory technical standards which differentiate between open and closed-ended AIFs have not yet been finalised, due to differences in approach between the Commission and ESMA.
- ESMA has published an opinion on practical arrangements to address late transposition of the Directive in the EU, where EU AIFMs want to use the management or marketing passport in states which have not yet transposed the Directive.

In the **UK:**

- The FCA has introduced a new FUND rulebook, and made changes to COBS and other rule books, and published related Perimeter Guidance, covering the implementation of the AIFM Directive into the FCA's rulebook, the various categories of AIFM which the FCA will authorise and the applicability of various parts of the existing rulebook to AIFMs.
- The FCA has also published forms and guidance for authorisation of AIFMs and notification forms covering, inter alia, passport marketing and marketing under the UK's national private placement regime.
- The FCA has advised AIFMs operating under the transitional arrangement to submit their application for authorisation by no later than 22 January 2014.
- The FCA has also published a consultation on guidance on the Directive's remuneration code, proposing guidance on provisions of the code dealing with, for instance, proportionality and the requirement to apply the code to delegates.

In **France**, the draft regulation implementing the AIFM Directive in the French Monetary and Financial Code was published on 17 April 2013. The revised part relating to managers within the general regulation of the

AMF (book III) was published on 12 June 2013. The final version of the part dealing with products within the general regulation of the AMF (book IV) implementing AIFMD provisions will be published shortly. The AMF has also issued various AIFM Guides regarding management companies, French AIFs and remuneration (which reflects its interpretation of ESMA Guidelines on remuneration policies applicable to AIFMs).

The regulation intends to (i) consolidate the rules for French asset management companies to create a single category of asset manager, whether regulated under AIFMD, UCITS or MiFID, with the same conditions for authorisation and (ii) simplify the range of fund products which may be offered to French investors, which will be UCITS, professional AIF, non-professional AIF and "other funds", including non-AIF single investor funds.

The regulation also intends to simplify the range of minimum investments with a simple distinction between no minimum investment amounts for retail investors and 100,000 euros for professional investors. The regulation also proposes to create a French "professional specialized fund" which will be structured to compete with the Irish Qualified Investment Fund (QIF) or Luxembourg Specialised Investment Fund (SIF), with a simplified regulatory approval procedure. This fund will be in the form of a corporate entity (SICAV-SA, SAS or perhaps *société en commandite* (i.e. French limited partnership)) or an FCP. The regulation also provides that, if an AIF has at least one retail investor, even if the fund's manager falls within the scope of the AIFM Directive's exemptions for authorisation, such an AIF will be required to appoint a depositary and its manager must be authorised under the AIFM Directive.

The regulation foresees a one year grandfathering period until 21 July 2014. During the grandfathering period a simplified approval procedure has been set up for existing management companies. A "tick the box form" has to be completed by which management companies undertake to comply with AIFMD requirements such as remuneration, valuation, reporting and delegation rules. This declarative approach will be followed by follow-up controls by the AMF to ensure that the management company complies with the AIFMD's requirements.

In **Germany**, the law implementing the AIFMD (KAGB) entered into force on 22 July 2013. A one year grandfathering period until 21 July 2014 to comply with the German implementation of the Directive applies to all existing funds and their AIFMs. According to the KAGB, Germany has abolished private placements with immediate effect, with an exception for ongoing private placements (i.e. those started before 21 July 2013) which will be permitted until 21 July 2014. After this date a full marketing notification to BaFin for any type of distribution will be required.

Most German closed-ended funds (often organized as a limited partnership (e.g. as a *Kommanditgesellschaft*)) have only recently (from 1 June 2012) been required to submit marketing notifications to BaFin for their distribution in Germany and were not obliged to obtain permissions for their management companies (i.e. their AIFM). Under the KAGB, such funds now have to submit new marketing notifications to BaFin and apply for permissions for their AIFMs for the first time. Since notifications or applications in some cases will have to be submitted to BaFin no later than 1 January 2014 (due to applicable periods for assessment by BaFin) and that initially the process for notification and application will be time consuming, clients should start with the necessary actions as soon as possible.

The legislation concerning the adaptation of the Investment Tax Act (InvStG) to the amended fund supervisory law which was changed by the enactment of the KAGB is still pending. Currently, the continued application of the Investment Tax Act follows on an interim basis on the order of continued validity issued by Decree of the Federal Ministry of Finance dated 18 July 2013.

In **Luxembourg**, the Parliament passed the law on the transposition of the AIFM Directive on 15 July 2013.

In addition to implementation of the Directive, the new law also covers other related changes that will have an impact on the legislation applicable to Luxembourg investment funds. The law provides for the creation of Luxembourg AIFMs as well as for the possibility of UCITS management companies to be authorised as AIFMs. Non-UCITS management companies will be limited to managing non-AIFs and small-AIFs opting to be out of scope of the Directive. The law also adds a new category of Professional of the Financial Sector (PSF), i.e. depositary of an AIF; introduces a Special Limited Partnership (*société en commandite spéciale*) which is similar to the English limited partnership and updates the current Limited Partnership (*société en commandite simple*) and partnership limited by shares (*société en commandite par actions*) regimes.

In **Ireland**, the European Union (Alternative Investment Fund Managers) Regulations 2013 implementing

the Directive were signed into law on 17 July 2013.

The Central Bank is using the implementation of the Directive as an opportunity to redesign the current regulatory framework for Irish alternative investment funds.

On 19 July 2013, the Central Bank published its AIF Rulebook which replaces the existing non-UCITS Notices and Guidance Notes, representing a consolidated version of the regulatory provisions governing AIFs. The key changes are: (i) removal of the promoter regime; (ii) replacement of the Qualifying Investors Fund regime with an enhanced Qualifying Alternative Investor Fund regime; (iii) introduction of share class flexibility within funds or sub-funds requiring 'fair' treatment of shareholders (rather than 'equal' under current regime); (iv) replacement of Irish prime brokerage rules with the Directive's criteria; (v) enhancement of the retail AIFs regime; and (vi) elimination of the Professional Investor Fund regime.

On 30 September 2013, the Central Bank published a fourth edition of their AIFMD Q&A. The AIFMD Q&A sets out answers to queries likely to arise in relation to the implementation of the AIFMD. It is published in order to assist in limiting any uncertainty until definitive positions and practises are finalised.

The Central Bank has approved several applications for authorization under the AIFM Directive.

Recommended Actions

The AIFM Directive has a substantial impact on authorisation of fund managers, their structure, their operations and the manner in which their funds are run. Firms should consider whether they are in scope, which entity should be authorised as the AIFM, the required new compliance policies and procedures and the required additional regulatory capital. Firms will need to consider their marketing arrangements in the EU, whether they want to use the passport and the additional compliance burden involved.

Current Key Documents and Further Guidance

- A copy of the Directive
- A copy of the Level 2 Regulation
- ESMA's final guidelines on "Key concepts of the AIFM Directive"
- The FCA's AIFM Directive page
- The UK HM Treasury regulations
- ESMA Remuneration Guidelines
- ESMA's consultation on reporting
- ESMA's opinion regarding late transposition
- The FCA's consultation on guidance on the remuneration code (see pages 152 to 174)

MiFID II

Jurisdiction: EU

Stage and Timing

The Commission published in October 2011 a proposed directive and regulation to amend MiFID (MiFID II).

MiFID II is currently subject to negotiation between the European Parliament and the Council of the EU. The Council of the EU confirmed that it had agreed a general approach on MiFID II on 21 June 2013. The European Parliament will consider MiFID II in plenary session in October 2013. MiFID II is expected to be implemented between mid 2014 and January 2015.

Impact and Considerations

The MiFID II proposals include (i) creation of a new type of trading venue within the regulatory framework, the organised trading facility (OTF), capturing all forms of organised trading that do not match existing categories; (ii) significantly increased regulation of commodities trading, including introducing a position reporting obligation and powers for regulators to intervene in trading activity; (iii) new powers for regulators to ban or restrict types of financial products; (iv) new safeguards on algorithmic and high frequency trading

activities (mainly to address market volatility); (v) a new regime for third countries which may require third country firms which establish a branch in the EU to acquire prior authorization from the host country in advance and to require a third country firm which provides investment services to retail clients to establish a branch in the territory where the retail client is established; and (vi) new pre and post trade transparency rules for non-equity products, including bonds and commodities, similar to the transparency rules which apply to regulated equity markets.

Recent Developments

The indicative date for the first reading by the European Parliament of MiFID II is 10 December 2013.

Current Key Documents and Further Guidance

- The Council's proposed general approach to the MiFID II Directive
- The Council's proposed general approach to the regulation

CRD IV

Jurisdiction: EU

Stage and Timing

The final texts of the Capital Requirements Regulation (CRR) and the CRD IV Directive, containing new capital requirements for credit institutions and MiFID investment firms, were published on 27 June 2013.

Impact and Considerations

Investment firms currently subject to the Capital Requirements Directive will be faced with higher capital requirements and new governance requirements.

Recent Developments

The European Parliament adopted the proposed CRD IV Directive on 16 April 2013. The final texts of the CRR and the CRD IV Directive were published on 27 June 2013. Member states must transpose the CRD IV Directive and apply its provisions from 31 December 2013.

The FCA has earlier published its approach to implementing transitional provisions in CRD IV.

The UK is taking legal action against the cap on bankers' bonuses in CRD IV at the European Court of Justice.

Recommended Actions

Investment firms subject to CRD IV will need to consider the impact on their capital requirements. UK firms should study the changes which the FCA will propose to its BIPRU and GENPRU rulebooks.

Current Key Documents and Further Guidance

- The final text of CRD IV
- The final text of CRR
- The FCA's statement on CRD IV implementation
- The FCA's guidance on CRD IV reporting

Financial Benchmarks

Jurisdiction: EU

Stage and Timing

The Commission published on 18 September 2013 a proposal for a regulation on indices used as benchmarks in financial instruments and financial contracts.

Impact and Considerations

The Regulation proposes to regulate the production and use of any financial index which is used as a benchmark for the amount payable under a financial instrument or is used to measure the performance of an investment fund.

The Regulation will raise standards for firms which administer benchmarks (i.e. firm which determines the benchmark or controls the input data) and firms which submit the input data, and includes a requirement for a benchmark administrator to apply for a specific regulatory authorization. The Regulation also requires benchmark administrators to publish the input data after publication of the benchmark, except where publication would have serious adverse consequences for the contributors.

Any "supervised entity" (which includes a MiFID manager or AIFM) may only use a benchmark it is provided by an authorised administrator or an administrator in a third country which is approved by the Commission as "equivalent" and the administrator is authorised in the third country.

The Regulation will have an impact on any manager which forms, for instance, an index tracking fund, calculates performance fee by reference to a benchmark or trades in any product (such as a derivative) which pays by reference to a benchmark.

Current Key Documents and Further Guidance

- A copy of the Regulation

Dodd-Frank – Commodity Futures Trading Commission Exemptions from Registration

Jurisdiction: US – SEC and CFTC

Stage and Timing

The CFTC has adopted final regulations on the use of exemptions from registration for sponsors of private funds.

Impact and Considerations

The CFTC has adopted final regulations which modify and remove certain CFTC exemptions widely used by sponsors of private funds. The CFTC Staff has issued multiple no-action letters that may temporarily or permanently assist qualifying sponsors of private funds with avoiding CFTC registration. The Department of the Treasury determined that certain foreign currency forwards and foreign currency swaps are not considered "swaps" for some CFTC jurisdictional issues including whether the contracts are counted toward the CPO de minimis trading registration exemption. The position limits rule was vacated and remanded to the CFTC in autumn 2012 for further work on the CFTC's cost-benefit analysis.

The CFTC Staff recently made available no-action relief from the fingerprinting requirement for associated persons ("APs") residing outside the United States who takes the necessary steps to avail themselves of the relief as outlined in the letter. This was a companion letter to relief the CFTC Staff previously made available to principals.

Recommended Actions

Private fund sponsors must be operating under an effective registration as a "commodity pool operator" (CPO) or be relying on the remaining *de minimis* commodity interest trading exemption on a fund-by-fund basis. If a private fund sponsor can qualify for no-action relief, the sponsor should have claimed the relief.

Registered CPOs must be filing CFTC Form CPO-PQR or NFA Form PQR on a quarterly basis depending on the CPO's size. Registered commodity trading advisors (CTAs) are likely to begin filing quarterly NFA Form PR for the quarter ending September 30, 2013, and all registered CTAs will file CFTC Form CTA-PR for the calendar year end 2013. For CPOs whose registration was effective as of March 31, 2013, the first filing is due May 30, 2013.

Any registered CPO or CTA that trades swaps needs to designate itself as a "swap firm" through the

National Futures Association online registration system. This designation is not to be confused with being a swap dealer. In addition, any AP involved in soliciting interests into commodity pools or commodity accounts in which swap trading takes place, and any AP who supervises those sales persons, should amend its NFA Form 8-R to be designated as a "swaps AP."

Current Key Documents and Further Guidance

Dechert has produced a number of *DechertOnPoints* on the CFTC rules under Dodd-Frank:

- CFTC Changes Rules Affecting Public and Private Funds
- CFTC Issues No-Action Relief Extending Compliance Date for Amended Rules 4.5 and 4.13(a)(4) to December 31, 2012
- CFTC Staff Releases Responses to Frequently Asked Questions Regarding Rule Amendments Affecting CPOs and CTAs.

Dodd-Frank – Rules on Major Swap Participants

Jurisdiction: US – SEC and CFTC

Stage and Timing

The SEC and CFTC have adopted final rules on "major swap participants", "major security-based swap participants", "swap" and "security-based swap".

Impact and Considerations

The CFTC has adopted final rules on "major swap participants", "major security-based swap participants", "swap" and "security-based swap".

Recommended Actions

Investment managers will need to determine if their status has changed to "major swap participant", which will depend on the scale of their trading in OTC derivatives. The scope of the definition of "commodity interest" now includes many types of OTC derivatives. A fund trading OTC derivatives may be a "commodity pool" and subject to the US CFTC where it was not previously, to the extent the fund has any US investors.

Where trading swaps with a U.S. nexus and to the extent not already completed, investment managers should be in contact with their swaps dealers to complete the necessary phases of the ISDA Dodd-Frank Act Protocol.

Current Key Documents and Further Guidance

Dechert has produced a number of *DechertOnPoints*:

- CFTC Finalizes Futures and Swaps Position Limit Rules
- CFTC Finalizes Swap Data Recordkeeping and Reporting Requirements
- CFTC Adopts Customer Property Segregation and Other Swap Regulations, Proposes Volcker Rule
- Impact of CFTC Swap Regulations on Structured Finance Industry

Dodd-Frank – Application of U.S. Rules in Cross-Border Contexts

Jurisdiction: US – CFTC

Stage and Timing

The CFTC has issued guidance regarding the definition of a U.S. person and an exemptive order regarding compliance with certain swaps regulations. SEC cross-border guidance is still in proposed form.

Impact and Considerations

The CFTC has issued guidance that for purposes of various Dodd-Frank Act rules. A collective investment

vehicle that is directly or indirectly majority-owned by U.S. persons, or that has its principal place of business in the U.S., is a U.S. person. There is an exemption from this definition where a collective investment vehicle is publicly offered outside the United States to non-U.S. persons. Collective investment vehicles that are deemed to be U.S. persons will be subject to required swap clearing, trade execution, real-time public swap reporting, large swap trader reporting and swap data record-keeping. Where a collective investment vehicle that is deemed to be a U.S. person enters into a swap with a non-U.S. swap dealer, obligations that would generally fall to the swap dealer (*i.e.*, swap data reporting and recordkeeping) could become the responsibility of the U.S. person collective investment vehicle. The exemptive order provides for a phase-in period which ends on 9 October 2013.

Recommended Actions

Investment managers need to determine whether their funds are U.S. persons and if so, whether the funds trade swaps with any non-U.S. counterparties. Investment managers should assess whether their funds are trading swaps for which U.S. persons are currently subject to mandatory central clearing through U.S. clearing-houses and negotiate relevant trading documentation to permit clearing.

Current Key Documents and Further Guidance

- The CFTC's guidance
- The exemptive order

Dodd-Frank – Execution of Swaps on Swap Execution Facilities (SEFs) and Designated Contract Markets (DCMs)

Jurisdiction: US – CFTC

Stage and Timing

SEFs are in the process of registering and beginning operations.

A swap trading facility that wishes to avoid an interruption in operations on November 1, 2013 (pushed back from October 2 by a no-action letter issued on September 27), must as of that date be granted either temporary registration status as a SEF or be granted full registration status as either a DCM or a SEF.

Market participants will be able to trade on a SEF that has obtained at a minimum temporary registration status as of November 1, 2013, but will not be required to trade on the SEF until the contract that it desires to trade receives a "made available to trade" (MAT) determination (expected 4Q2013).

Impact and Considerations

Recommended Actions

Parties intending to trade swaps on SEFs need to review and sign SEF user agreements.

Dodd-Frank – Block Trading of Swaps Subject to SEF or DCM Rules

Jurisdiction: US – CFTC

Stage and Timing

The CFTC has set minimum block trade sizes for different types of swaps (except equities) above which an off-exchange swap trade required public reporting is delayed and mandatory trade execution is not applicable.

Impact and Considerations

Actual compliance will be required by the later of the applicable deadline for mandatory clearing for a certain swap, or 30 days following an available-to-trade determination for a certain swap to be deemed effective. SEFs/DCMs must submit the swap for approval before it can be deemed available-to-trade.

Although some swaps are subject to mandatory clearing, no SEF or DCM has made an application to list a

contract, so available-to-trade determinations have not been made yet.

On July 31, 2013, the CFTC staff provided no-action relief that essentially classifies all swap trades above the block size minimums as large notional off-facility swaps, but is permitting aggregation to reach those minimums. The no-action relief will expire when the relevant swap is made available to trade on a SEF or DCM. The CFTC staff later issued an amended letter that recognizes that some DCMs have made a very limited number of contracts available to trade.

Recommended Actions

Advisers must obtain consent from their clients to transaction in block trades on their customers' behalf. Also, while the final rules do not expressly require client consent for aggregating positions with other clients, the preamble to the final rules suggests that such consent should be obtained.

Registered CTA Reporting

Jurisdiction: US – NFA

Stage and Timing

Registered commodity trading advisors (CTAs) will need to begin filing new NFA Form PR on a quarterly basis beginning with third quarter of 2013.

Impact and Considerations

Recommended Actions

All registered CTAs would need to review the new NFA Form PR form, capture relevant data for the form as of September 30, 2013 and make the filing through the NFA Easyfile system.

Current Key Documents and Further Guidance

- A copy of NFA Form PR
  The NFA held a webinar to discuss NFA Form PR on October 3 at 11am, a copy of which can be accessed and viewed on the NFA website.

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Part C - Regulation of Investment Funds

US FATCA

Jurisdiction: US

Stage and Timing

The US Foreign Account Tax Compliance Act became law in March 2010.

FFIs must register with the IRS through an online "Portal" by 25 April 2014 to be included on an IRS list of participating and registered deemed-compliant FFIs to be published on 2 June 2014 and updated monthly. Non-participating FFIs will be subject to withholding beginning on 1 July 2014 (for withholding on US source dividends, interest and other US source income) and 1 July 2017 (for withholding on gross proceeds). Withholding on non-US source passthru payments will not occur before 2017. New account opening procedures generally must be implemented by 1 July 2014.

Fund managers may act as "sponsoring entities" on behalf of funds that they manage, in which case such managers will serve as a control point of contact with the IRS and the Portal.

Impact and Considerations

FATCA is a new reporting and withholding regime intended to prevent US investors from evading tax by investing through foreign entities. FATCA requires foreign financial institutions (FFIs) to report information to the US IRS regarding their US account holders or otherwise suffer potential US withholding taxes.

Recent Developments

An IRS Notice issued on 12 July 2013 generally postponed the registration procedures by six months and provides guidance for FFIs in jurisdictions that have signed but not yet concluded an intergovernmental agreement (IGA). The UK government has signed an IGA with the US government to allow "Reporting UK Financial Institutions" to fulfil their reporting obligations on US account holders by reporting directly to the UK Revenue. The IGA also confirms which types of accounts are within scope and the types of UK regulated entities which are "deemed compliant" FFIs and not subject to the requirements. The Irish government has also signed an IGA which is similar to the IGA signed by the UK government. Reporting Irish Foreign Financial Institutions will report directly to the Irish Revenue Commissioners, without needing to withhold on or terminate recalcitrant account holders. Other jurisdictions which have concluded IGAs are Denmark, Mexico, Ireland, Switzerland, Norway, Spain, Germany and Japan, although many other jurisdictions are discussing or investigating IGAs with the US government.

The IRS opened the registration portal on 19 August 2013. Even if begun immediately, however, the registration process cannot be finalized until after 1 January 2014. Paper registration is also an option, but will result in slower processing times and, as with online registration, cannot be finalized until after 1 January 2014. The registration process must be completed for each affected foreign financial institution by 25 April 2014, for the institution to appear on an electronic list to be published by the IRS beginning on 2

June 2014 (and thereafter updated monthly) and avoid FATCA withholding beginning on 1 July 2014.

The IRS issued on 9 September 2013 correcting amendments to the final FATCA regulations, which were published on 28 January 2013. Among other corrections and clarifications, the amendments broaden eligibility to act as a "sponsoring entity" of a foreign financial institution.

Recommended Actions

Managers should consider acting as sponsoring entities for their managed funds and appointing third party, service providers to carry out the funds' FATCA obligations.

Managers also will need to determine whether their funds fall within any "deemed compliant" category, and will need to determine the extent of their reporting or withholding responsibilities and amend account opening procedures as necessary to comply with FATCA. Documentation, including offering documents, administration agreements, distribution agreements, management agreements and ISDA documentation may need FATCA provisions.

Current Key Documents and Further Guidance

- *DechertOnPoint* 'Final Proposed FATCA Regulations Issued'
- A copy of the US-UK IGA
- *DechertOnPoint* "Revised timeline for Implementing FATCA"

UCITS IV, V and VI Directives

Jurisdiction: EU

Stage and Timing

The European Parliament published its adopted text of UCITS V on 4 July 2013. The draft will now go to the European Parliament for consideration. UCITS V is likely to be implemented towards the end of 2015.

Separately, the Commission has published a consultation paper on further changes to the UCITS regime (UCITS VI). The Commission expects to publish its legislative proposal for UCITS VI in October 2013.

Impact and Considerations

Recent Developments

The key changes made to UCITS by UCITS V relate to the UCITS depositary function, remuneration and sanctions for breach of the rules. The rules relating to the depositary function are similar to the equivalent provisions in the AIFM Directive. The text of the version of UCITS V adopted by the European Parliament did not include the "bonus cap", but includes similar requirements in relation to variable remuneration as in the AIFM Directive.

In relation to UCITS VI, the topics which the Commission is consulting on include eligible assets and use of derivatives, efficient portfolio management (EPM) techniques, the use of OTC derivatives, extraordinary liquidity management tools and passporting rights for UCITS depositaries.

Current Key Documents and Further Guidance

- The adopted text of UCITS V
- Commission FAQs
- The Commission's consultation on UCITS VI

ESMA Guidelines on ETFs and Other UCITS Issues

Jurisdiction: UK – FCA

Impact and Considerations

Recent Developments

The FCA has confirmed that it will incorporate ESMA's Guidelines on ETFs and other UCITS issues into the COLL handbook. It is consulting on this and the change is likely to take effect in November 2013.

The Guidelines cover, inter alia, the use of indices by UCITS funds, specific requirements for UCITS ETFs , the use of derivatives to gain exposure to underlying portfolios and the use of repurchase and reverse repo by UCITS funds.

Recommended Actions

All UCITS funds using index tracking strategies, and all UCITS EFTs, should review their compliance with the Guidelines.

Current Key Documents and Further Guidance

- The FCA's quarterly consultation
- A *DechertOnPoint* on the Guidelines

FCA's Retail Distribution Review

Jurisdiction: UK – FCA

Stage and Timing

The FCA published a policy statement in April 2013 with new rules which ban the payment of commission from product providers to platforms. These rules enter into force on 6 April 2014.

Impact and Considerations

The FCA has published final text of the conduct of business rules which ban payments from product providers to platforms and cash rebates from product providers to clients. The rules enter into force on 6 April 2014, although firms have the benefit of a transitional period that runs until 5 April 2016 for legacy payments. In broad terms, platforms are services which provide execution and custody of investments from more than one product provider.

Recommended Actions

These rules apply to any investment manager or fund paying commission to platforms, which typically distribute products on an execution only basis. Firms should make available any "RDR ready" share class to platforms and check the terms of their distribution agreements with platforms to ensure they are compliant with the RDR.

Current Key Documents and Further Guidance

- The FCA's RDR page

Proposed EU Regulation of Packaged Retail Investment Products (PRIPs)

Jurisdiction: EU

Stage and Timing

The Council of the EU confirmed that it had agreed a general approach on the PRIPs Regulation on 26 June 2013.

The Commission published the final text of its PRIPs legislative proposal on 9 July 2012. The Regulation is likely to be implemented at the end of 2015.

Impact and Considerations

PRIPs are all types of investment products "where the amount repayable to the investor is subject to fluctuations because of exposure in reference values or to the performance of assets which are not directly purchased by the investor." This covers insurance based products, structured term deposits and virtually all

investment funds.

The Commission has proposed a requirement to provide a "key information document" (KID) when the product is made available to retail investors, applying the same principles in the UCITS Directive's KIID.

Current Key Documents and Further Guidance

- The Council's proposed general approach to the PRIPs Regulation

Money Market Funds

Jurisdiction: EU

Stage and Timing

The Commission published a proposal for a Regulation on Money Market Funds on 4 September 2013.

Impact and Considerations

The Commission's regulation overlays existing regulation governing money market funds, namely UCITS Directive and AIFM Directive.

The regulation envisages separate authorization of money market funds. It deals with eligible assets, diversification requirements and portfolio rules. In particular, it requires a constant NAV fund to maintain a cash buffer of at least 3% of NAV, meaning that it must hold 3% of its assets in cash in a ringfenced account.

Current Key Documents and Further Guidance

- The proposed Regulation

FCA Proposal to Restrict Retail Distribution of Unregulated Collective Investment Schemes

Jurisdiction: UK – FCA

Stage and Timing

The FCA published on 4 June 2013 a policy statement with its final rules on the retail distribution of unregulated collective investment schemes. The rules come into force on 1 January 2014.

Impact and Considerations

The FCA has revised the categories of investors to whom an authorised person can promote an unregulated scheme. It has restricted the ability of financial advisers to promote a scheme to any retail investor on the basis of a suitability check, and to any person who is already a participant in a scheme (COBS 4.12 table). The FCA has introduced new exemptions for certified high net worth investors, certified and self-certified sophisticated investors, for the promotion of US mutual funds to US citizens in the UK and UCITS funds approved outside the UK but not in the UK.

The following schemes are not within the new marketing restriction: securities issued by SPVs which pool investment in listed or unlisted shares or bonds; exchange traded products; overseas investment companies which would be investment trusts if they were in the UK; REITs and venture capital trusts.

Current Key Documents and Further Guidance

- The FCA' s policy statement

Shadow Banking

Jurisdiction: EU

Stage and Timing

The Financial Stability Board (FSB) published a final set of policy recommendations in relation to "shadow banking" in September 2013.

IOSCO has issued policy recommendations to provide the basis for common standards for the regulation and management of money market funds across jurisdictions.

The Commission published a "Communication" on shadow banking on 4 September 2013.

Impact and Considerations

According to the FSB policy recommendations, any investment fund which extends or trades in credit (non-bank credit intermediation) or is a money market fund may be subject to regulatory supervision, on the basis that such funds raise systemic risk concerns.

The European Parliament's resolution includes suggestions such as extending capital requirements to all unregulated entities, imposing limits on the complexity of financial products or considering whether shadow banking entities linked to a bank should be included on the bank's balance sheet.

Recent Developments

The Commission's "Communication" on shadow banking gives an indication of the shape of future legislation to address shadow banking concerns. The Commission stated that it will use the UCITS VI review to assess "the way in which certain investment techniques and strategies are used" and will particularly focus on "how investment funds use securities financing." The Commission also states that it may develop securities law to limit the risks associated with securities financing transactions. There is no clear indication that the Commission will amend the AIFM Directive to limit the activities of non-UCITS funds involved in lending, although the Commission does refer to extending the scope of the prudential banking rules (CRR and CRD IV) to entities performing activities similar to those of banks which do not hold a banking licence and calls for an assessment on the way in which credit institutions are identified in the EU.

Current Key Documents and Further Guidance

- The FSB's page on shadow banking
- The Commission's Communication, *Shadow Banking – Addressing New Sources of Risk in the Financial Sector*

New Legislation for Real Estate Investment Trusts (REITs)

Jurisdiction: Ireland

Stage and Timing

The new Finance Act 2013 sets out the criteria a company must satisfy in order to be classified as an REIT.

Impact and Considerations

REITs will be established as listed companies and may be used to invest in a diverse range of rental investment properties in a tax efficient manner.

Where the qualifying criteria are met, the REIT will be exempt from corporation tax on qualifying income and gains. Stamp duty is payable on acquisition of assets and share transfers. Where a fund wishes to convert into a REIT there is a deemed sale and reacquisition by the company immediately before and immediately after obtaining REIT status.

The REIT is required to be listed, derive at least 75% of its income from property rental business, distribute at least 85% of its profits annually to its investors and 75% or more of the aggregate market value of its assets must be assets of the property rental business. Distributions will be subject to dividend withholding tax (currently 20%) and will be taxable in the hands of the shareholders.

This new structure should encourage investment in property by facilitating investment from investors seeking income yielding investments. However, given the conditions generally applicable to REITs, such

as borrowing restrictions and risk diversification requirements, in many cases the existing regulated and unregulated structures will continue to be the most suitable vehicles for investments in property which do not fit the profile for a REIT.

Current Key Documents and Further Guidance

- The Irish REITs proposal

New Corporate Structure for Funds (SICAV)

Jurisdiction: Ireland

Stage and Timing

The Irish Minster for Finance has approved in principle the development of legislation for a new corporate structure (a SICAV). Legislation is expected in 2013.

Impact and Considerations

The SICAV will meet US check the box taxation requirements and reduce administrative costs on funds by removing the need for compliance with various requirements of Irish company law.

Once the legislation is introduced, it will still be possible to establish a fund as a variable capital investment company pursuant to Part XIII of the Companies Act 1990 (VCC). It will also be possible for existing VCCs to convert to a SICAV.

Current Key Documents and Further Guidance

- The legislative proposal

Client Asset Regulations and Guidance

Jurisdiction: Ireland

Stage and Timing

On 2 August 2013, the Central Bank published a consultation paper on Client Asset Regulations and Guidance, which will replace the existing Client Asset Requirements. As well as the consultation paper, the Central Bank has also published new Regulations and Guidance for the proposed regime change.

Impact and Considerations

The Regulations are based on seven Client Asset Core Principles which reflect the fundamental obligations on all firms holding client assets. Fund service providers will be, for the first time, subject to Client Asset Regulations in respect of client funds held in collection accounts. The daily calculation will be expanded to include margin transactions for investment firms writing margin transactions. The Regulations do not permit a firm to maintain any asset other than client assets in a client asset account/Collection Account, e.g. firm's own funds in the form of a 'Buffer'. Firms will be required to appoint an individual to a Client Asset Oversight Role. Firms will be required to create, document and maintain a client asset management plan in order to safeguard client assets.

Current Key Documents and Further Guidance

- A copy of the consultation

Prohibition on the Origination of Loans by Alternative Investment Funds

Jurisdiction: Ireland

Stage and Timing

The Central Bank has begun to consider the possibility of abolishing its prohibition on the origination of

loans by alternative investment funds and, as such, published a discussion paper seeking the views of interested parties and posing questions on the topic in July 2013.

Impact and Considerations

The discussion has largely been brought about by the 'Funding Gap' caused by the reluctance of Irish banks to lend since the recession hit in 2008. It is suggested that allowing funds to originate loans could encourage economic growth in this respect.

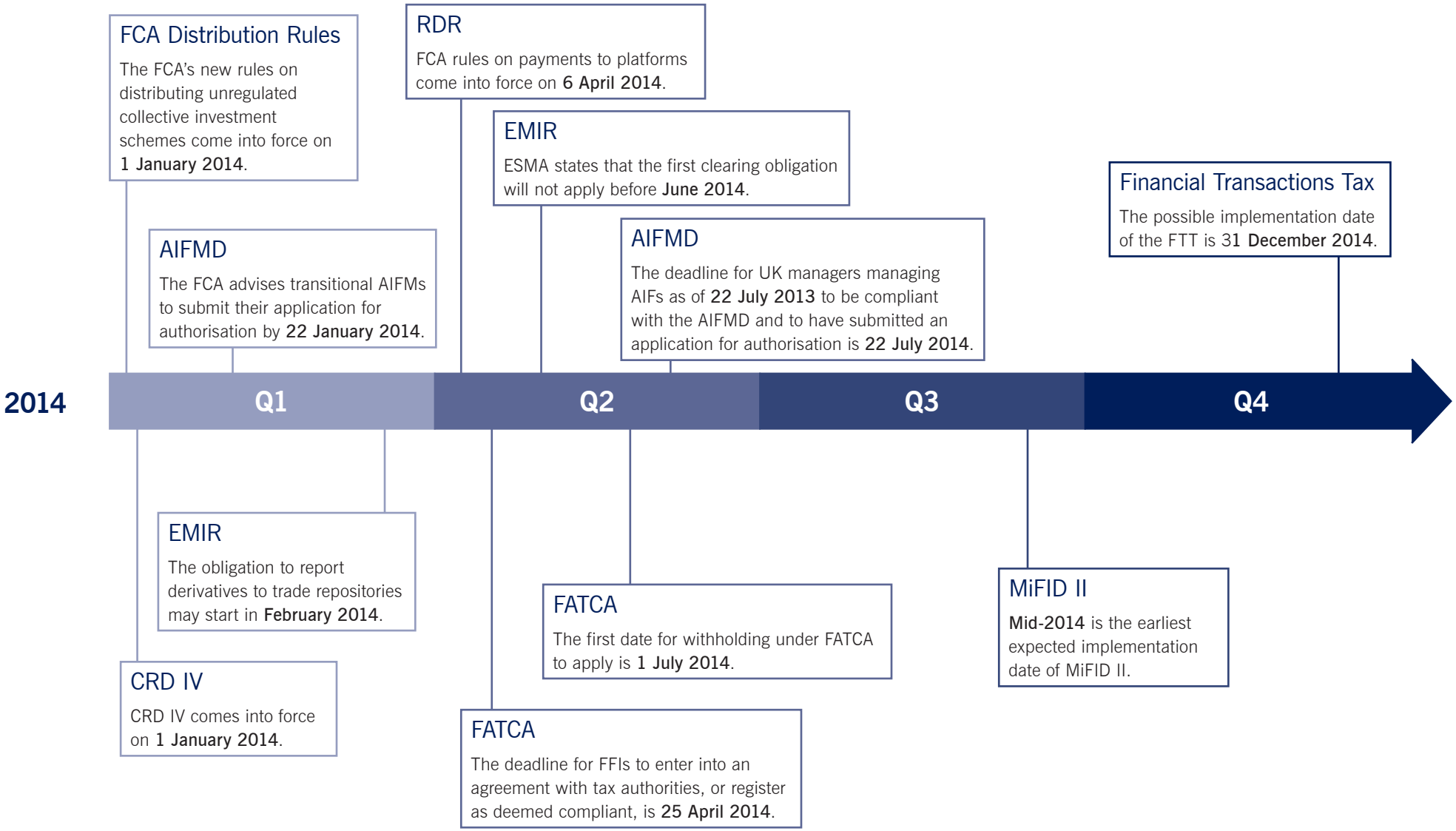
The Discussion Paper clarifies that Loan Origination Funds, if permitted, will be incorporated into a product regime with key product features. The Discussion Paper suggests that this will likely include some "hard wired" limits with regard to lending.

The Discussion Paper lists a number of key policy questions on the regulation of Loan Origination AIFs. The deadline for issuing responses to these questions has now passed.

Current Key Documents and Further Guidance

- The *DechertOnPoint* on this topic

Regulatory Calendar – Key Milestones



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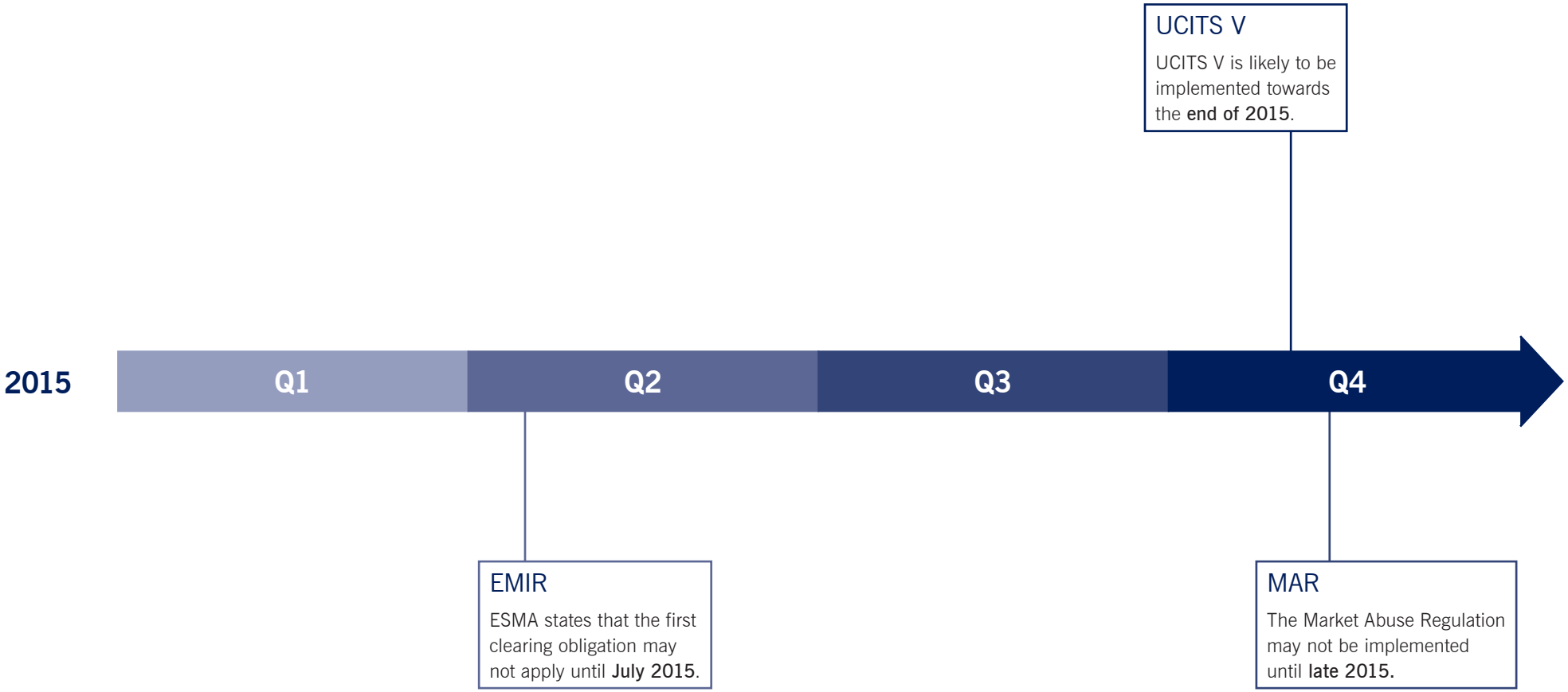
UCITS V
UCITS V is likely to be implemented towards the end of 2015.
2015
Q1
Q2
Q3
Q4
EMIR
ESMA states that the first clearing obligation may not apply until July 2015.
MAR
The Market Abuse Regulation may not be implemented until late 2015.

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