SHEARMAN & STERLING LLP

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP
WEEKLY NEWSLETTER

Financial Regulatory Developments Focus

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In this issue:

In this newsletter, we provide a snapshot of the principal European, US and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructures, asset managers and corporates.

G20 Leaders Summit

G20 Leaders' Communiqué

On November 16, 2014, the G20 Leaders published a Communiqué following the summit held in Brisbane on November 15 and 16, 2014. On financial reforms, the G20 Leaders welcome the recent proposals for global systemically important banks ("G-SIBS") to hold additional loss absorbing capacity, endorse the roadmap for shadow banking reform and call on regulatory authorities to further progress on implementing derivatives reforms.

The G20 Leaders' Communiqué is available at: https://www.g20.org/sites/default/files/g20_resources/library/brisbane_g20_leaders_summit_communique.pdf.

Financial Stability Board Reports on Financial Reform Progress and Next Steps

On November 14, 2014, the Financial Stability Board ("FSB") published the following documents which were delivered to the G20 Leaders for the Brisbane summit:

1. A letter from Mark Carney, Chair of the FSB, summarizing the progress in financial reforms;
2. An overview report on progress in implementation of the financial reforms;
3. A progress report on measures taken in the shadow banking arena; and
4. A report on the FSB's review of the structure of its representation.

According to the FSB, implementation of financial reforms at national level is progressing well. The FSB, and other international policy bodies, will be working to complete work in the following areas in 2015: (i) the application of numerical haircut floors for uncleared securities financing transactions ("SFTs") to non-bank-to-non-bank transactions; (ii) standards and processes for global securities financing data collection and aggregation, including a timeline for implementation

of the data collection (the FSB has recently published proposals on this, see below); (iii) analysis of the potential harmonization of regulatory approaches to re-hypothecation of client assets and the financial stability issues related to collateral re-use; (iv) incorporation of the numerical haircut floors for uncleared SFTs into the Basel III framework; and (v) guidance on the scope of consolidation of prudential regulation. In addition, progress reviews will be conducted on the implementation of the reforms for money market funds ("MMFs"), the recommendations for aligning incentives associated with securizations, including risk retention requirements, and implementation of the shadow banking reforms. The FSB will assess whether further policy recommendations for shadow banking entities may be necessary.

The FSB also published a progress report on reform of resolution regimes and resolution planning for G-SIBs. The report states that there has been continued progress by jurisdictions to adopt the powers required to resolve failing banks, but that only a few jurisdictions have fully implemented the FSB's key attributes of effective resolution regimes for financial institutions. Resolution powers such as bail-in, or mechanisms to give effect to foreign resolution actions have not yet been adopted by most jurisdictions, and the FSB will continue to carry out reviews and monitor the progress of implementation. The priorities identified by the FSB to progress are: (i) finalizing the common international standard on total loss absorbing capacity that G-SIBs are required to have; (ii) achieving the adoption of contractual recognition of temporary stays on early termination and cross-default rights in financial contracts; (iii) developing further guidance to support resolution planning by home and host authorities; and (iv) promoting the full implementation of the FSB's requirements for resolution regimes and resolution planning beyond the banking sector.

The letter and reports are available at: http://www.financialstabilityboard.org/wp-content/uploads/FSB-press-release-84-2014.pdf and http://www.financialstabilityboard.org/wp-content/uploads/Resolution-Progress-Report-to-G20.pdf.

Basel Committee Reports on Basel III Reforms

On November 12, 2014, the Basel Committee on Banking Supervision ("Basel Committee") published two reports for the G20 Leaders on: (i) measures to reduce excessive variability in banks' regulatory capital ratio; and (ii) implementation of the Basel III regulatory reforms. The Basel Committee is taking steps to improve consistency and comparability in bank capital ratios by revising the standardized approaches for calculating regulatory capital ratios and reducing modeling choices when determining estimates of credit, market and operational risk-weighted assets. The second report on the implementation of the Basel III standards confirms that all Basel Committee members have now implemented risk-based capital regulations, and that the adoption of Basel III regulations for liquidity and leverage ratios for G-SIBs, as well as domestic systemically important banks, is now taking place.

The reports are available at: http://www.bis.org/bcbs/publ/d298.pdf and http://www.bis.org/bcbs/publ/d299.pdf.

International Organization of Securities Commissions Reports on Regulation of Money Market Funds and Implementation of Incentive Alignment Recommendations for Securitization

On November 14, 2014, the International Organization of Securities Commissions ("IOSCO") issued two reports for the G20 Leaders on: (i) the regulation of MMFs; and (ii) the implementation of incentive alignment recommendations for securitization. The report on the regulation of MMFs sets out IOSCO's preliminary findings on the adoption of MMF legislation, regulations and policies, and states that most jurisdictions that took part in the review have or will soon have measures in force to deal with areas subject to reform, including valuation practices and liquidity management. The report on the implementation of incentive alignment recommendations for securitization sets out IOSCO's preliminary findings on the adoption of legislation, regulations, policies and other measures on incentive alignment for securitizations. IOSCO has found that there has been good progress in the implementation of measures by most jurisdictions that took part in the review.

The reports are available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD463.pdf and http://www.iosco.org/library/pubdocs/pdf/IOSCOPD464.pdf.

Bank Prudential Regulation & Regulatory Capital

Federal Reserve Board Issues FAQ Guidance on Leveraged Lending

On November 7, 2014, the US Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") issued a document outlining Frequently Asked Questions ("FAQs") on the March 2013 Interagency Guidance on Leveraged Lending. Topics addressed in the guidance include risk management and reporting, stress testing, underwriting, pipeline managements, methods for determining enterprise value, participations purchased, and a definition of leverage lending. The guidance is applicable to all banks that take part in leverage lending activities, which includes community banks supervised by the Federal Reserve Board with total consolidated assets of $10 billion or less. For further details, you may want to read our client note at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2014/11/US-Bank-Regulators-Publish-FAQs-and-2014-SNC-Review-of-Leveraged-Lending-FRI-111014.pdf.

The FAQs are available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20141107a3.pdf.

Delegated Regulation under CRD IV Published in Official Journal of the European Union

On November 15, 2014, the Delegated Regulation supplementing the Capital Requirements Directive IV ("CRD IV") package with regard to regulatory technical standards ("RTS") for the specification of the methodology for the identification of global systemically important institutions ("G-SIIs") and for the definition of subcategories of G-SIIs was published in the Official Journal of the European Union. The Delegated Regulation deals with the parameters for the methodology, identification procedures, allocation of scores, indicators and transitional provisions. The Delegated Regulation applies to banks and certain investment firms and enters into force on December 5, 2014.

The Delegated Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.330.01.0027.01.ENG.

European Banking Authority Consults on Methodology for Internal Ratings Based Approach

On November 12, 2014, the European Banking Authority ("EBA") issued a consultation paper on draft RTS on the assessment methodology for the internal ratings based ("IRB") approach under the Capital Requirements Regulation ("CRR"). Under the CRR, powers are given to national regulators to allow banks that meet certain conditions to use the IRB approach to estimate their own funds requirements for credit risk. The draft RTS set out standards on the methodology that is to be used by national regulators to assess whether a firm is compliant with the requirements necessary to use the IRB approach, for example, when a firm seeks to apply to use the IRB approach. Regulators will also use the RTS to assess on an ongoing basis whether firms meet the IRB approach requirements. The consultation closes on March 12, 2015.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/891573/EBA-CP-2014-36+%28CP+on+RTS+on+Assessment+Methodology+for+IRB+Approach%29.pdf.

Basel Committee Reports on National Discretions Within the Basel Capital Framework

On November 12, 2014, the Basel Committee published a report on the national discretions within the Basel capital framework which allow standards to be implemented in different ways by national regulators in different jurisdictions. The report lists the jurisdictions that use a particular discretion and states that these discretions can be useful in the structure and development of those financial systems that require different approaches. However, the Basel Committee concludes that these discretions can lead to a lack of comparability of implementation across different jurisdictions.

The report is available at: http://www.bis.org/bcbs/publ/d297.pdf.

Bank Structure

Federal Reserve Board and Other Agencies Update Volcker Rule FAQs

On, November 13, 2014, the Federal Reserve Board, the FDIC, the OCC, the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") updated the Volcker Rule FAQs, adding two questions regarding metrics reporting during the conformance period and mortgage-backed securities ("MBS") of government-sponsored enterprises. The Volcker Rule prohibits "banking entities" (as defined in the Volcker Rule) from engaging in proprietary trading activities and acquiring or retaining ownership interests in hedge funds and private equity funds and certain other funds, referred to as "covered funds" in the regulations implementing the Volcker Rule.

The FAQs relating to metrics reporting state that while certain banking entities are currently required to report metrics relating to the prohibition on proprietary trading, reporting of the related limits is not required until the end of the conformance period under the Volcker Rule, although banking entities that have established limits are urged to report such limits.

The FAQs relating to MBS state that certain federally sponsored issuers of MBS, such as those sponsored by Fannie Mae, are exempt from the Investment Company of 1940 under Section 2(b) of that Act and therefore would not be covered funds for the purposes of the Volcker Rule.

The updated FAQs are available at: http://www.federalreserve.gov/bankinforeg/volcker-rule/faq.htm.

Derivatives

US Agencies Jointly Issue Interpretive Release on Forward Contracts with Embedded Volumetric Optionality

On November 13, 2014, the SEC and the CFTC, after consultation with the Federal Reserve Board, put out an interpretive release on "Forward Contracts with Embedded Volumetric Optionality" in accordance with Section 712(d)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC and CFTC provide clarification on forward contracts that allow for different delivery amounts, and explain when a contract or agreement would qualify for exclusion in regards to the "swap" and "future delivery" definitions from the Commodity Exchange Act ("CEA") or otherwise would be categorized as a regulated trade option.

The SEC release is available at: http://www.sec.gov/rules/interp/2014/33-9681.pdf.

Commodity Futures Trading Commission Issues No-Action Position and Interpretations Addressing the Holding of Customer Funds

On November 13, 2014, the CFTC issued no-action relief regarding Regulation 30.7 which addresses the holding of customer funds deposited to margin foreign futures and foreign options transactions by futures commission

merchants ("FCMs"). Additionally, the CFTC also issued two interpretations of Regulation 30.7. Under Regulation 30.7, a FCM is only permitted to maintain a maximum of 120 percent of the required margin on the customers' foreign futures and foreign options positions in accounts with non-US depositories. The purpose of the no-action relief allows a FCM to exclude customer funds deposited with a foreign bank or trust company that otherwise qualifies as a depository under Regulation 30.7 from the calculation of the 120 percent limit.

CFTC Staff Letter N. 14-138 is available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-138.pdf.

Commodity Futures Trading Commission Issues No-Action Relief to Non-US Swap Dealers Regarding Certain Transaction-Level Requirements

On November 14, 2014, the CFTC Divisions of Swap Dealer and Intermediary Oversight, Clearing and Risk, and Market Oversight issued a time-limited No-Action Letter regarding the applicability of "Transaction-Level Requirements in Certain Cross-Border Situations". This is essentially an extension of relief to swap dealers ("SDs") established under non-US jurisdictions from certain transaction-level requirements of the CEA. Transaction-level requirements, as opposed to entity-level requirements, apply on a transaction-by-transaction basis and include requirements such as clearing and swap processing, margining, and mandatory trade execution. The letter will provide relief until September 30, 2015 or until a CFTC action regarding the non-US SDs is effective, whichever comes earliest.

The letter is available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-140.pdf.

Enforcement

Financial Conduct Authority, Commodity Futures Trading Commission and Office of the Comptroller of the Currency Impose Fines for FX Rigging

On November 12, 2014, the UK's Financial Conduct Authority ("FCA") imposed fines totaling approximately £1.1 billion ($1.7 billion) on five banks (Citibank N.A., JPMorgan Chase Bank N.A., Royal Bank of Scotland plc, UBS N.A. and HSBC Bank plc) for failing to control business practices in their G10 spot foreign exchange ("FX") trading operations. The FCA is launching an industry-wide remediation program so that the root causes of these failings are addressed and standards can be increased across the market. Senior management will be required to take responsibility for implementing the necessary changes and will also have to attest that such changes have been implemented.

On the same date, the CFTC imposed fines totaling approximately $1.4 billion on the same five banks, for the manipulation of global FX benchmark rates. The OCC also fined Bank of America Corp., JPMorgan Chase & Co and Citigroup Inc. an additional and collective $950 million, for FX trading improprieties. The CFTC

requires the banks to take specified steps to strengthen their internal controls, which include the heightened supervision of FX traders. One of the primary benchmarks that FX traders attempted to manipulate is the World Markets/Reuters Closing Spot Rates ("WM/R Rates"), which are used to establish the relative values of different currencies and are the most widely referenced FX benchmark rates globally.

The press releases are available at: http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings; http://www.cftc.gov/PressRoom/PressReleases/pr7056-14#PrRoWMBL; and http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html.

Financial Conduct Authority Proposes Updated Guidance on Financial Crime

On November 14, 2014, the FCA published a proposed updated financial crime guide to include examples of good practices that emerged from the regulator's review of anti-money laundering, sanctions, and anti-bribery and corruption systems and controls in place by small banks and insurance firms. The FCA considers that work is still to be done by some firms to reduce the risk of financial crime. The FCA guidance is not binding on firms but should be considered by firms implementing systems and controls. The consultation closes on February 6, 2015.

The consultation paper is available at: http://www.fca.org.uk/static/documents/thematic-reviews/gc14-07.pdf.

Financial Market Infrastructure

Committee on Payments and Market Infrastructures Publishes Report on Cyber Resilience

On November 12, 2014, the Committee on Payments and Market Infrastructures issued a report on cyber resilience in financial market infrastructures ("FMIs"), which examines the current cyber risks that FMIs face and how these risks can be addressed. The report has found that cyber resilience is a top priority for FMIs, and risks to FMI systems are being addressed. The report describes the evolving practices that can help FMIs recover operations quickly, even in extreme scenarios.

The report is available at: http://www.bis.org/cpmi/publ/d122.pdf.

Financial Services

European Banking Authority Consults on Product Oversight Guidelines for Retail Banking Products

On November 10, 2014, the European Banking Authority ("EBA") launched a consultation on proposed Guidelines for product oversight and governance arrangements for retail banking products. The Guidelines cover mortgages, loans, deposits, credit cards, payment services, payment accounts and electronic money in the retail sector. The Guidelines, which are addressed to EU national regulators, require the establishment of product oversight and governance arrangements for

the making and distribution of retail banking products as well as reviews throughout the lifecycle of the products. The EBA is expected to publish final guidelines in Q2 2015. The proposed Guidelines are expected to apply from April 1, 2016. Responses to the consultation are due by February 10, 2015.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/888290/EBA-CP-2014-37+%28Draft+Guidelines+on+POG%29.pdf.

UK Payment Systems Regulator Proposals for Regulating Payment Systems

On November 14, 2014, the Payment Systems Regulator ("PSR"), which is a subsidiary of the FCA, published proposals for a new regulatory framework for payment systems in the UK. The PSR is a new UK regulator which will regulate the largest UK payment systems from April 1, 2015. HM Treasury is responsible for designating the payment systems that will be subject to regulation and consulted on its proposals earlier this year which included the proposed designation of Bacs, CHAPS, Faster Payment Service, LINK, Cheque and Credit Clearing, Northern Ireland Cheque Clearing, MasterCard and Visa. Some of these are already interbank payment systems regulated by the Bank of England. However, the Banking Reform Act expressly excludes the Bank of England from the scope of the PSR. Regulation of a payment system will include the operator of the payment systems, the payment service providers and the infrastructure providers to the payment system. The PSR is consulting on proposals on: (i) an approach to industry strategy development for which it intends to set up a new Payments Strategy Forum and to launch a market review into ownership and competitiveness of infrastructure provision; (ii) ownership, governance and control of, and access to, payment systems, including requirements for more transparent decision-making, disclosure on access requirements and conflicts of interest; (iii) monitoring, enforcement and dispute resolution; and (iv) high-level standards for conduct for industry participants. The consultation closes on January 12, 2015. The PSR expects to publish its final Policy Statement by the end of March 2015.

The consultation paper is available at: http://www.fca.org.uk/static/documents/psr/psr-cp14-1-cp-a-new-regulatory-framework-for-payment-systems-in-the-uk.pdf.

UK Government Consults on Extending Senior Managers Regime to UK Branches of Foreign Banks

On November 17, 2014, HM Treasury published its proposals for extending the new UK senior managers' regime to UK branches of foreign banks and Prudential Regulation Authority ("PRA") designated investment firms (i.e. those branches that deal in investments as principal in the UK that are regulated by the PRA). The proposals do not extend the potential liability of a senior manager in a UK branch of a foreign firm to the new offence relating to a decision causing a firm to fail. However, the reverse burden of proof on a senior manager when a firm fails to comply with its regulatory requirements would apply. If the proposals proceed,

the FCA and PRA will be responsible for making the final rules. The UK regulators have some flexibility in making rules in terms of their approach to different types of firms. This means that approaches may be different for UK branches of firms established in the European Economic Area ("EEA") than for that adopted for UK branches of firms established outside of the EEA. Both regulators are expected to consult on proposed rules for UK branches of foreign firms before the end of 2014. The PRA and FCA consulted on their approach to UK firms earlier this year but were waiting for the proposals from HM Treasury on extending the senior managers regime to UK branches of foreign firms before consulting on their rules in that regard. Final rules are expected in Q1 2015 for both UK firms and UK branches of foreign firms. Responses to the HM Treasury consultation are due by January 30, 2015.

The consultation paper is available at: https://www.gov.uk/government/consultations/regulating-individual-conduct-in-banking-uk-branches-of-foreign-banks.

Recovery & Resolution

EBA Consults on Draft Guidelines under the Bank Recovery and Resolution Directive

On November 11, 2014, the EBA published two consultation papers that include draft guidelines under the Bank Recovery and Resolution Directive ("BRRD") on: (i) the treatment of shareholders in bail-in or the write-down and conversion of capital instruments; and (ii) the rate of conversion of debt to equity in bail-in. The draft guidelines describe how the bail-in power should be applied and their aim is for the bail-in powers of resolution authorities to be an effective way of absorbing losses and recapitalizing banks in resolution.

The draft guidelines on the treatment of shareholders in bail-in or the write-down and conversion of capital instruments mainly describe the distinction that should be made when applying the bail-in power. A choice can be made by resolution authorities to: (i) cancel existing shares or other instruments of ownership, or transfer them to bailed-in creditors; and/or (ii) dilute holdings of existing shareholders and holders of other instruments as a result of the conversion of relevant capital instruments or eligible liabilities to equity. The BRRD states that dilution should only take place when the firm under resolution has a positive net asset value, and if this is not the case, shares should be transferred or cancelled. This means that losses would not be imposed on other creditors of an institution in resolution until shareholders absorb the maximum loss that is possible.

The draft guidelines on the rate of conversion of debt to equity in bail-in state how different conversion rates from debt to equity should be applied for different types of liability. The guidelines set out two main principles for resolution authorities to set conversion rates: (i) no shareholder or creditor should receive a worse treatment than in insolvency; and (ii) differential conversion rates should only be set to respect other principles under the BRRD. Both consultations close on February, 6 2015.

The consultations are available at: http://www.eba.europa.eu/documents/10180/890569/EBA-CP-2014-40+CP+on+GL+on+shareholders+treatment+in+bail-in.pdf and http://www.eba.europa.eu/documents/10180/890758/EBA-CP-2014-39+CP+on+GL+on+conversion+rates.pdf.

International Swaps and Derivatives Association Publishes Resolution Stay Protocol

On November 13, 2014, the International Swaps and Derivatives Association ("ISDA") published the ISDA 2014 Resolution Stay Protocol, which is an industry initiative towards addressing the too-big-to-fail issue by improving the efficiency of cross-border resolution of the largest banks. Parties to derivatives contracts that adhere to the protocol are able to amend their ISDA master agreements and related arrangements to opt-in to resolution regimes that stay certain default rights that would otherwise arise when a bank fails. Eighteen banks have already adhered to the Protocol and the provisions will become effective for these initial adhering parties on January 1, 2015. All entities can adhere to the Protocol.

The Protocol is available at: http://assets.isda.org/media/f253b540-25/958e4aed.pdf.

Shadow Banking

Financial Stability Board Consults on Standards and Processes for Global Securities Financing Data Collection and Aggregation

On November 13, 2014, the FSB issued a consultation document on standards and processes for global securities financing data collection and aggregation. The FSB is proposing recommendations to national regulators on how to design their procedures for data collection from reporting entities as well as data reporting and aggregation, so as to ensure consistency and the collation of meaningful global aggregates. The FSB proposes a set of standards and processes for: (i) global securities financing data collection and aggregation; and (ii) data elements for repurchase agreements, securities lending and margin lending that national regulators will report as aggregates to the FSB. The FSB will also consider adding supplementary data elements for: (i) transactions that are economically equivalent to repos, securities and margin lending; (ii) the calculation of metrics of collateral velocity; and (iii) the implementation of the regulatory framework for haircuts on non-centrally cleared securities financing transactions. The consultation closes on February 12, 2015 and the FSB intends to finalize the standards and processes in 2015.

The consultation is available at: http://www.financialstabilityboard.org/wp-content/uploads/Global-SFT-Data-Standards-Consultative-Document.pdf.

Events

November 21, 2014: US Senate hearing on improving financial institution supervision.

January 12, 2015: EBA open hearing on draft guidelines on treatment of shareholders in bail-in and draft guidelines on rate of conversion of debt to equity in bail-in under the BRRD.

January 15, 2015: EBA public hearing on product oversight and governance guidelines for retail banking products.

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.

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