SHEARMAN & STERLING LLP

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WEEKLY NEWSLETTER

Financial Regulatory Developments Focus

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

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Bank Prudential Regulation & Regulatory Capital

US Board of Governors of the Federal Reserve System Releases Proposed Rule to Modify Capital Plan and Stress Testing Rules

On September 26, 2016, the US Board of Governors of the Federal Reserve System issued a proposed rule modifying the capital plan and stress testing rules for the 2017 test cycle. The proposed changes include the elimination of the qualitative portion of the Comprehensive Capital Analysis and Review for certain large and noncomplex firms (generally, firms with less than $250 billion in total consolidated assets), along with a reduction in the amount of data that such firms would be required to submit on the FR Y-14 regulatory reports. Such institutions however, would remain subject to the quantitative CCAR requirements and to normal supervision by the Federal Reserve Board regarding their capital planning. The proposed rule would be effective for the 2017 CCAR. Comments on the proposal are due by November 25, 2016.

In a speech given the same day, Federal Reserve Board Governor Tarullo stated that the Federal Reserve Board is considering adoption of a "stress capital buffer approach" to setting post-stress capital requirements whereby the G-SIB capital surcharge would be factored into the estimate of the amount of capital required under stress. However, Governor Tarullo emphasized that this was a preliminary proposal and would not apply to the 2017 cycle of CCAR.

The text of the proposal is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160926a1.pdf.

The text of Governor Tarullo's speech is available at:
http://www.federalreserve.gov/newsevents/speech/tarullo20160926a.htm.

US Federal Deposit Insurance Corporation Publishes Semi-Annual Update of Global Capital Index

On September 20, 2016, the US Federal Deposit Insurance Corporation released the semi-annual report of the Global Capital Index. In a concurrent statement, Vice-Chairman Thomas M. Hoenig noted that while Global Systemically Important Banks did increase their equity capital, a beyond-proportionate increase in assets led to a net increase in the overall leverage of G-SIBs. Vice-Chairman Hoenig also noted that asset quality in Europe remains an issue in comparison to the United States, with more than three times as many non-performing loans, and that better-capitalized banks trade at a premium when compared to banks with weaker capital positions. Vice-Chairman Hoenig noted that, while banks are better capitalized now, with average leverage ratios of around 5%, such ratio remains inadequate should banks have to withstand losses similar to the last financial crisis.

The text of Vice-Chairman Hoenig's statement is available at: https://www.fdic.gov/news/news/speeches/spsep2016.html.

The Global Capital Index is available at: https://www.fdic.gov/about/learn/board/hoenig/capitalizationratio2q16.pdf.

US Federal Deposit Insurance Corporation Updates Deposit Insurance Fund Figures

On September 20, 2016, FDIC Chairman Martin Gruenberg issued a statement on the release of updated data regarding the FDIC's Deposit Insurance Fund. (DIF) The DIF balance stood at almost $78 billion, leading to a reserve ratio of 1.17%, an eight-year high. Chairman Gruenberg's statement noted that the FDIC still intends to reach the statutory minimum ratio of 1.35% set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act, before September 30, 2020.

The text of Chairman Gruenberg's statement is available at: https://www.fdic.gov/news/news/speeches/spsep2016a.html.

European Banking Authority Draft Guidance on Information and Communication Technology Risk

On October 6, 2016, the European Banking Authority launched a consultation on the proposed Guidelines for the assessment of Information and Communication Technology risk under the Supervisory Review and Evaluation Process. The increasing complexity of ICT risk in the banking industry and the increasing potential adverse prudential impact such risks pose to individual firms and on the sector as a whole has led the EBA to propose the Guidelines. The purpose

of the proposed Guidelines is to promote common procedures and methodologies for regulators throughout the EU when they are conducting supervisory assessments of a firm's governance and strategy on ICT and a firm's exposures and controls, as required by the Capital Requirements Directive. National regulators should apply the Guidelines to their assessment of firms proportionately, as set out in the EBA SREP guidelines. The proposed Guidelines should be read alongside the EBA SREP Guidelines. Responses to the consultation are due by January 6, 2017.

The draft Guidelines are available at: http://www.eba.europa.eu/documents/10180/1608089/Consultation+Paper+on+Guidelines+on+ICT+Risk+Assessment+under+the+SREP.pdf and the EBA SREP Guidelines are available at: https://www.eba.europa.eu/regulation-and-policy/supervisory-review-and-evaluation-srep-and-pillar-2/guidelines-for-common-procedures-and-methodologies-for-the-supervisory-review-and-evaluation-process-srep-.

European Banking Authority Publishes Final Guidelines on Implicit Support for Securitization Transactions

On October 3, 2016, the EBA published final Guidelines on implicit support for securitization transactions under the Capital Requirements Regulation. Examples of such transactions include purchases of deteriorating credit risk exposures from an underlying pool or improvement of quality of credit enhancements through the addition of higher quality risk exposures.

The CRR places restrictions on providing implicit support to securitizations. These rules apply in addition to the so-called "skin in the game" requirements on originators to retain part of the risk on securitizations. To prevent uncapitalized risks of implicit support, the CRR requires that any reduction in capital requirements gained through a securitization must be justified by a corresponding transfer of risk to third parties. The CRR also states that a transaction is not considered to provide support to a securitization if it is executed under arm's length conditions and taken into account in the assessment of significant risk transfer. The CRR requires a sponsor or originator institution that has failed to comply with this requirement to, at a minimum, hold own funds against all of the securitized exposures as if they had not been securitized. The Guidelines set out an objective test in relation to the definition of "arm's length conditions." A transaction will be considered to be executed on arm's length terms where the terms of the transaction are such as they would be used in a normal commercial transaction if the parties had no relationship with each other, and each party acted independently, entered into the transaction of its own volition, acted in its own interests and did not enter into the transaction on the basis of extraneous considerations. The Guidelines also set out conditions in relation to the assessment of significant risk transfer and the relevant factors that will be taken into consideration. The Guidelines will apply from March 1, 2017.

The final Guidelines are available at: http://www.eba.europa.eu/documents/10180/1603711/Final+report+on+Guidelines+on+implicit+support+for+securitisation+transactions+%28EBA-GL-2016-08%29.pdf.

EU Legislation Amending Technical Standards for Reporting of Financial Information to Regulators Published

On September 29, 2016, a Commission Implementing Regulation amending Implementing Technical Standards on the reporting of financial information under the CRR was published in the Official Journal of the European Union. The ITS lay down uniform requirements in relation to supervisory reporting to regulators, pursuant to the CRR, in the following areas: (i) own funds requirements and financial information; (ii) losses stemming from lending collateralized by immovable property; (iii) large exposures; (iv) leverage ratio; and (v) Liquidity Coverage requirements and Net Stable Funding Requirements. The amending Regulation amends the definitions, templates and instructions used for the purposes of supervisory reporting. The amending Regulation is based on draft ITS submitted by the EBA in March 2016. The amending Regulation will enter into force on October 19, 2016 and will apply from December 1, 2016 with the first reporting date being December 31, 2016.

The amending Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1702&from=EN.

European Banking Authority Publishes Final Guidelines on Application of Definition of Default

On September 28, 2016, the EBA published the final Guidelines specifying the application of the definition of default in relation to the Internal Ratings Based Approach and the Standardized Approach under the CRR. The CRR sets out the definition of default of an obligor that is used for the purposes of the IRB and Standardized Approaches. The purpose of the Guidelines is to harmonize the definition of default across the EU framework so that EU banks apply regulatory requirements to their capital positions in a more consistent and comparable way, especially in the context of IRB models. The Guidelines expand on various aspects of the application of the definition of default including the "days past due" criterion for default identification, indications of unlikeliness to pay, specific aspects of the application of the definition of default for retail exposures, application of the default definition in a banking group, treatment of external data and criteria for a return to non-defaulted status. The EBA expects that this harmonization will help reduce the burden of compliance for cross-border groups, reducing overall risk-weighted asset variability across firms. The definition of default impacts own funds requirements under the IRB Approach and the Standardized Approach. In the context of the IRB Approach, the definition of default will influence risk weights and expected loss calculation for both defaulted and non-defaulted exposures. The definition of default under the Standardized Approach forms the basis for the categorization of exposures to the class of exposures in default in line with the CRR provisions on default exposures. The Guidelines will only come into force once they have been translated into the official languages of the EU. The EBA acknowledges that implementation of the Guidelines may take significant resources for certain firms, particularly those firms that apply the IRB Approach and where the default definition will significantly affect their existing approach. Therefore, the EBA has set the application date of the Guidelines to January 1, 2021. However, national regulators have discretion to accelerate implementation of the Guidelines.

The Guidelines are available at: http://www.eba.europa.eu/documents/10180/1597103/Final+Report+on+Guidelines+on+default+definition+%28EBA-GL-2016-07%29.pdf.

Date of UK Stress Test Results Announced

On October 3, 2016, the Bank of England announced that the results of the UK 2016 banking stress test would be reported to the relevant firms involved on November 29, 2016 and published on November 30, 2016. The 2016 test is the first to be designed under the new approach to stress testing published in October 2015 and covers seven UK banks and building societies: Barclays plc, HSBC Holdings plc, Lloyds Banking Group plc, Nationwide Building Society, The Royal Bank of Scotland Group plc, Santander UK plc and Standard Chartered plc.

The Bank also announced that for the first time the UK stress test next year will include two scenarios: the annual cyclical scenario, which assesses the risks to the banking system resulting from the financial cycle, and an additional "exploratory" scenario which assesses a bank's resilience to a wider range of potential threats.

The announcement is available at: http://www.bankofengland.co.uk/publications/Pages/news/2016/074.aspx.

UK Regulator Finalizes Standards for Underwriting Buy-to-Let Mortgages

On September 29, 2016, the Prudential Regulation Authority published a Policy Statement and Supervisory Statement setting out its final policy approach to underwriting standards for buy-to-let mortgage contracts. The Supervisory Statement sets out the minimum standards that firms should use to underwrite buy-to-let mortgage contracts, including minimum requirements for affordability assessments. It also clarifies that the PRA's expectation is that the reduction of capital requirements under the CRR for loans to small and medium-sized enterprises should not be applied where the purpose of the loan is to fund a buy-to-let business. The standards will apply to all PRA-regulated firms undertaking

buy-to-let lending that are not subject to regulation by the Financial Conduct Authority. The PRA expects firms within scope to ensure that the standards are adopted by other firms within their groups that undertake buy-to-let lending.

The new standards will need to be implemented by relevant firms by January 1, 2017 for the interest cover ratio tests and interest rate affordability stress tests. The remaining standards will need to be implemented by September 30, 2017.

The Policy Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2816.pdf and the Supervisory Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ss/2016/ss1316.pdf.

Conduct & Culture

UK Banking Standards Board Publishes Report on the Role of Professional Bodies and Professional Qualifications

On October 3, 2016, the UK Banking Standards Board published a report on the role of professional bodies and the types of professional qualifications in the UK banking sector. The Banking Standards Board is an independent non-statutory body that was established in April 2015 to help raise standards of behavior and competence across the UK banking sector. The Report contains research on whether and how the role of professional bodies could be strengthened in order to promote higher standards of behavior and competence across the industry. The BSB stresses five key challenges facing the industry. These include the perceived low profile of professional bodies within the banking sector and the lack of established banking qualifications or a tiered framework of qualifications, which give (and are recognized to give) a thorough grounding in the fundamentals of banking. Despite the challenges listed, the report concludes that there is potential for professional bodies to play a more significant role in raising the level of competence and ethical behavior in the sector.

The Report is available at: http://www.bankingstandardsboard.org.uk/wp-content/uploads/2016/10/160928-Professionalism-in-banking-publication-FINAL-WEB.pdf.

UK Financial Conduct Authority Discusses the Application of the Senior Managers Regime to a Firm's Legal Function

On September 28, 2016, the FCA published a discussion paper about how and why the legal function currently falls within the Senior Manager & Certification Regimes and whether it should continue to do so. In the lead up to implementation of the SM&CR in March 2016, the FCA became aware of significant uncertainty amongst firms as to whether an individual responsible for the management of a firm's legal function would require approval as a Senior Manager. Where heads of legal are responsible for compliance, there is a clear need to register, but the position is less clear for heads of legal who do not hold this additional function. The FCA published a statement on January 27, 2016, advising that firms that have sought to make decisions in good faith about whether an individual needs approval in their firm for this responsibility, based on the current rules and guidance, should not need to change their approach.

The FCA is seeking to clarify its approach and policy rationale behind applying the SM&CR to the legal function and engage with the legal profession further so that it can better understand the concerns that have been raised. The FCA sets out certain arguments that have been made as to why the legal function should or should not fall within the scope of the SMR, the most important of which relate to professional privilege and the ability to provide independent advice. The FCA's view appears to be that an individual needs to be responsible for the management of the legal function and that such management is separate from the function of providing legal advice. The FCA's SMR is intended to prevent any gaps in key responsibilities within a firm because if a systemic failing in the management of the legal function occurs, that could create risks that impact the wider business and result in a regulatory failing within the firm. However, if an in-house lawyer is designated as a Senior Manager with responsibility for the management of the legal function, situations may arise where that individual needs to defend his actions under the duty of responsibility which could entail needing to disclose privileged advice. The privilege that attaches to the advice is the firm's to waive and not the

individual's which raises conflicts of interest issues too. The FCA would like feedback on whether there are any policy arguments for and against inclusion of the management of the legal function in the SMR that it has not considered in the Discussion Paper and whether the SM&CR should include a requirement to allocate overall responsibility for the management of the legal function to a Senior Manager. The consultation closes on January 9, 2017.

The FCA's discussion paper on the legal function under the SM&CR is available at: https://www.fca.org.uk/publication/discussion/dp16-4.pdf.

UK Regulators Revise Rules on Regulatory References

On September 28, 2016, the PRA and the FCA published revised rules on regulatory references for banking and insurance firms subject to the Senior Manager and Certification Regime and the Senior Insurance Manager Regime, respectively. Regulatory references are employment references passed between firms when an individual moves roles. The PRA and FCA consulted late last year on proposals to implement the recommendation of the Fair and Effective Markets Review that a mandatory form of regulatory references be introduced. Feedback to the proposed rules raised concerns about the legal consequences of the requirements and pointed to data protection and confidentiality issues.

The regulators therefore published interim regulatory reference rules in February 2016, which came into effect on March 7, 2016, in line with the commencement of the SM&CR and SIMR. These interim rules apply to banks, building societies, PRA-designated investment firms and incoming third-country branches of those firms, as well as Solvency II insurance firms. The interim rules require one regulated firm to provide references to another regulated firm which contain all relevant information of which the first firm is aware as soon as reasonably practicable following a request. When hiring a candidate for a function within the regulatory reference rules (senior management functions, certified functions and notified non-executive directors) firms must also take reasonable steps to obtain appropriate references covering a candidate's past five years of service.

The PRA and FCA have made some changes to their proposed rules, revised the regulatory reference template and clarified firms' obligations. Changes include an extension of the period for requesting references to the prior six years of employment (from five) and not requiring firms to obtain full regulatory references when appointing an individual from a firm which is part of its own group, provided that the group's internal policies and procedures allow the firm to obtain all the information it would need to assess the fitness and propriety of an individual. The regulators clarify that firms will be expected to take reasonable steps to obtain references from all current and former employers even where those employers are firms outside the UK. However, the regulators recognize that there may be legal impediments to obtaining such information and will take those into account when assessing a firm's compliance. The PRA has also published revised supervisory statements which set out more fully how the PRA expects firms to comply with the new rules.

The revised rules will become effective from March 7, 2017, although firms are being encouraged to use the revised template before that date. The PRA and FCA will consider whether to extend the regulatory reference requirements to other firms once the SM&CR is extended to all other UK-authorized firms.

The PRA's Policy Statement and Final Rules are available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2716.pdf, the PRA's updated Supervisory Statement under SM&CR is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ss/2016/ss2815update2.pdf, the PRA's updated Supervisory Statement under SIMR is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ss/2016/ss3515update.pdf and the FCA's Policy Statement and Final Rules are available at: https://www.fca.org.uk/sites/default/files/ps16-22.pdf.

UK Regulators Propose Extending Some of Their Whistleblowing Requirements to UK Branches of Overseas Banks

On September 28, 2016, the PRA and the FCA launched separate consultations on proposals to extend some of their whistleblowing requirements to UK branches of non-EEA banks. The proposals do not apply to UK branches of EEA banks. The regulators are proposing that non-EEA banks should be required to inform their employees about the regulators' whistleblowing services. Moreover, any non-EEA banking group that has both a UK subsidiary and a UK branch should inform branch staff about the subsidiary's whistleblowing arrangements. The PRA is also proposing that all insurers should inform employees about whistleblowing procedures.

Since September 7, 2016, UK banks, building societies and credit unions with assets of £250 million or greater, PRA-designated investment firms, insurance and reinsurance firms within the scope of Solvency II or regulated by the Society of Lloyd's, as well as Lloyd's managing agents, have been required to implement internal whistleblowing procedures. They must also inform employees of the internal procedures and the whistleblowing services provided by the PRA and FCA and to ensure that employment contracts and settlement agreements do not deter employees from whistleblowing.

Responses to the consultation are requested by January 9, 2017. The final rules are expected to apply from September 2017.

The PRA's consultation paper is available at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3516.pdf and the FCA's consultation paper is available at: https://www.fca.org.uk/sites/default/files/cp16-25.pdf.

UK Regulators Move to Amend UK's Senior Manager & Certification Regime

On September 28, 2016, the PRA and the FCA launched a consultation proposing amendments to the Senior Manager & Certification Regime. Most of the changes result from the legislative changes made in the Bank of England and Financial Services Act 2016. However, the regulators are also proposing some other changes which they consider appropriate having had the opportunity to assess the SM&CR in practice.

Both regulators are consulting on proposed guidance on the so-called "duty of responsibility." The duty of responsibility replaced the presumption of responsibility and allows the regulators to take action against a Senior Manager for misconduct if his/her firm contravenes a regulatory requirement at the time that the Senior Manager was responsible for the management of those aspects of the firm's activities. The regulators will need to show that the Senior Manager did not take reasonable steps to prevent or stop the contravention. The PRA's proposed guidance on what may constitute "reasonable steps" and how they can be documented has not materially changed following the shift from the presumption of responsibility to the duty of responsibility. The FCA is proposing a non-exhaustive list of considerations that may be relevant when determining whether a Senior Manager was responsible for the relevant area at the relevant time as well as a non-exhaustive list of considerations it will take into account when considering whether reasonable steps were taken by a Senior Manager.

Both regulators are also proposing to extend the application of some of the Conduct Rules to notified non-executive directors in banks, building societies, credit unions and dual-regulated investment firms (relevant authorized persons or RAPs) and insurance firms. Notified NEDs are NEDs that are not in scope of the SMR.

In addition, the PRA is proposing to introduce a new Senior Management Function, known as the Chief Operations function in RAPs, together with a new PRA Prescribed Responsibility. This is intended to bring within the scope of the SM&CR those individuals with overall responsibility for managing and ensuring the operation continuity and resilience of the internal operations, systems and technology of a firm. The PRA is also proposing additional criteria for the Head of Key Business Area function and clarifications of its expectations of Statements of Responsibilities and Management Responsibilities Maps.

Responses to each consultation paper are due by January 9, 2017. The PRA anticipates that its final rules will come into effect within two months of the regulators publishing their final rules, with the exception of the introduction of the new Chief Operations SMF, the new Prescribed Responsibility and the additional criteria for the Head of Key Business Area function, which will each take longer to implement. The FCA has stated that it intends to publish final guidance on the duty of responsibility in early 2017 and will publish its rules on extending the Conduct Rules to Notified NEDs later in 2017.

The PRA's consultation paper is available at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3416.pdf, the FCA's consultation paper on proposed guidance on the duty of responsibility is available at: https://www.fca.org.uk/sites/default/files/cp16-26.pdf and the FCA's consultation paper on applying the conduct rules to all NEDs in the banking and insurance sectors is available at: https://www.fca.org.uk/sites/default/files/cp16-27.pdf.

Compensation

European Banking Authority Publishes Final Guidelines on Remuneration Policies for Retail Banking Sales Staff

On September 28, 2016, the EBA published final Guidelines on compensation policies and practices related to the sale and provision of retail banking products and services. The purpose of the Guidelines is to protect consumers from risks associated with poor compensation policies and practices that promote the mis-selling of financial products. The Guidelines apply to compensation paid to staff employed by credit institutions, credit intermediaries, payment institutions and electronic money institutions when selling deposits, payment accounts, payment services, electronic money, residential mortgages and other forms of credit to consumers. The Guidelines contain a framework for such firms to implement compensation policies and practices to improve the correlation between compensation of sales staff and the fair treatment of consumers, with the overall objective of reducing the risk of mis-selling whilst also minimizing conduct costs for firms. The final Guidelines have been amended following feedback received during consultation. Amendments include separate requirements for approval and monitoring of compensation policies and practices, clarification of the type of information to be recorded by firms to achieve compliance, limiting delegation of design and monitoring of compensation policies to ensure that the management body retains ultimate responsibility and clarification that the need to obtain advice on the compensation policies and practices is limited to firms that have established a compensation committee. The implementation date of Guidelines has been postponed from January 3, 2017 to January 13, 2018. The extension is to provide market participants with enough time to implement the Guidelines given the revised application date of MiFID II of January 3, 2018 and align with the application date of the Payment Services Directive II, January 17, 2018.

The Guidelines are available at: http://www.eba.europa.eu/documents/10180/1596785/Final+report+on+Guidelines+on+remuneration+of+sales+staff+%28EBA-GL-2016-06%29.pdf.

UK Prudential Regulation Authority Publishes Final Rules for Buy-Outs of Variable Remuneration

On September 28, 2016, the PRA published a Policy Statement and final rules on buy-outs of deferred variable remuneration, i.e., where a firm compensates a new employee for deferred variable remuneration not received from a previous employer due to the employee having left the former firm. Current compensation rules, which seek to encourage greater alignment between risk and reward, as well as more effective risk management, allow employers to withhold or reduce unpaid or unvested awards (i.e., the "malus" rules) or recoup paid or vested awards (i.e., the "clawback" rules). The PRA is concerned that the practice of buy-outs could undermine these rules as employees could evade accountability for their actions during a previous employment by moving to a new employer who buys out their cancelled deferred remuneration.

The PRA had proposed that buy-out terms in contracts between new employers and employees should allow for malus or clawback to be applied following a notification by the old employer that an employee had been found to have committed misconduct or had risk management failings in his previous employment. Due to concerns about the administrative burden on prospective employers, the PRA has amended the rules so that an employee can request a remuneration statement from their previous employers which includes details of unvested variable remuneration which can then be passed to the new employer. The new employer would then be able to decide whether to provide a buy-out and, if it proceeds, provide a buy-out notice to all previous employers where the unvested variable remuneration is attributable. The new employer will not be able to provide a buy-out of more than the aggregate amount in the statements provided to it. The PRA is retaining the rule that will allow new employers to apply for a waiver for each employee if they believe the old employer's decision to apply malus or clawback is unfair or unreasonable. However, the PRA's view is that firms are unlikely to need to make a waiver application.

The new rules will apply to banks, building societies and PRA-designated investment firms, including UK branches of non-EEA headquartered firms and amend the existing Remuneration Part of the PRA Rulebook. The rules will apply to buy-out contracts concluded on or after January 1, 2017.

The PRA has added guidance on buy-outs to its proposed consolidated Supervisory Statement on remuneration, the consultation on which was launched on September 28, 2016.

The PRA's Policy Statement on Buy-outs is available at:
http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2616.pdf, the PRA's final rules on Buy-outs are available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2616app1.pdf and information on the proposed consolidated Supervisory Statement is available at:
http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3316.pdf.

UK Regulators Consult on Compensation Guidance

On September 28, 2016, the PRA and the FCA published proposed revised guidance on remuneration, principally to bring their guidance into line with the EBA's Guidelines on Sound Remuneration Policies which apply from January 1, 2017. The remuneration rules and guidance will apply to banks, building societies and investment firms, including UK branches of non-EEA headquartered firms.

The PRA sets out its expectations on how firms should adhere to the EBA Guidelines and provides additional guidance on the EBA Guidelines as well as on material risk takers, the application of malus and clawback to variable remuneration, remuneration committees, Long Term Incentive Plans and remuneration structures, including guaranteed variable remuneration and buy-outs. The PRA is proposing to introduce a consolidated Supervisory Statement on remuneration by amalgamating the existing statements on proportionality, the application of malus to variable remuneration and other aspects of remuneration.

The FCA is proposing changes to its Handbook that would remove certain inconsistencies between the existing provisions and the EBA Guidelines. The proposed changes would also provide firms with additional guidance on how the FCA expects firms to implement the EBA Guidelines.

Comments on the proposals are due by November 28, 2016. The PRA's existing Supervisory Statements will continue to apply until a final consolidated statement is published. The FCA will publish its final rules and guidance in a Policy Statement after it has assessed feedback to the consultation.

The PRA's consultation paper is available at:
http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3316.pdf and the FCA's consultation paper is available at: https://www.fca.org.uk/sites/default/files/cp16-28.pdf.

Consumer Protection

US Court of Appeals for the DC Circuit Declares Structure of the US Consumer Financial Protection Bureau Unconstitutional

On October 11, 2016, the US Court of Appeals for the DC Circuit declared the structure of the US Consumer Financial Protection Bureau unconstitutional, stating that the "massive, unchecked power" exercised by its director, Richard Cordray, lacks necessary supervision and direction from the President of the United States. It also vacated a $109.2 million penalty against PHH Corp., a home mortgage loan provider, sending it back to the CFPB for further proceedings.

Judge Brett Kavanaugh, writing for the DC Circuit panel, noted that, "[t]he CFPB's concentration of enormous executive power in a single, unaccountable, unchecked director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision-making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency." As a remedy, Kavanaugh focused on giving the President power "to remove the director at will, and to supervise and direct the director." He stated that this "will not affect the ongoing operations" of the agency.

The case was originally brought against the CFPB by PHH last year, after Cordray issued a decision finding that PHH engaged in a kickback scheme by only referring customers to mortgage insurers that had contracts with Atrium Insurance Co. Atrium was created by PHH in 1994 and provides "reinsurance" to mortgage insurance companies to take on some of the risk. Cordray's decision required PHH to pay $109.2 million in disgorgement rather than the $6.4 million ordered by an administrative law judge. In overturning the judge's initial penalty, Cordray argued that PHH committed a separate violation "every time it accepted a reinsurance payment from a mortgage issuer." PHH appealed the decision, challenging not only the legal foundation of Cordray's decision but also the constitutionality of the CFPB.

The CFPB has been criticized for its broad authority granted as part of the Dodd-Frank Act's financial reform package, and particularly for the power vested in a single individual at the head of the agency. The Obama administration has defended the structure of the CFPB and the limits on the President's ability to remove the agency head.

A dissenting opinion in the case argued that the court should not have addressed the constitutional question raised by PHH.

The opinion is available at:
https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf.

US Consumer Financial Protection Bureau Issues Final Rule to Protect Prepaid Account Users

On October 5, 2016, the CFPB issued a final rule that applies federal consumer protections under Regulations E and Z for prepaid account users for the first time. Prepaid accounts may be loaded with funds by a consumer or by a third party, such as an employer. Consumers generally can use these accounts to make payments, store funds, withdraw cash at ATMs, receive direct deposits or send money to others.

Specifically, the rule requires financial institutions to: (i) limit consumers' losses when funds are stolen or cards are lost; (ii) investigate and resolve errors; and (iii) give consumers free and easy access to account information. The CFPB also finalized new "Know Before You Owe" disclosures for prepaid accounts to give consumers clear, upfront information about fees and other key details. Finally, under the new rule, prepaid companies must generally offer protections similar to those for credit cards if consumers are allowed to use credit in their accounts to pay for transactions that they lack the money to cover.

The rule covers traditional prepaid cards, including general purpose reloadable cards, as well as mobile wallets, person-to-person payment products and other electronic prepaid accounts that can store funds. Other prepaid accounts covered

by the new rule include payroll cards, student financial aid disbursement cards, tax refund cards and certain federal, state and local government benefit cards such as those used to distribute unemployment insurance and child support.

Prepaid accounts are among the fastest growing consumer financial products in the United States. The amount consumers put on "general purpose reloadable" prepaid cards grew from less than $1 billion in 2003 to nearly $65 billion in 2012, with the total dollar value loaded onto these prepaid cards expected to further increase to $112 billion by 2018.

Prepaid accounts may be loaded with funds by a consumer or by a third party, such as an employer. Consumers generally can use these accounts to make payments, store funds, withdraw cash at ATMs, receive direct deposits or send money to others.

The final rule is available at: http://files.consumerfinance.gov/f/documents/20161005_cfpb_Final_Rule_Prepaid_Accounts.pdf and CFPB Director Cordray's remarks regarding the rule are available at: http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-prepaid-accounts-rule-press-call/.

UK Regulator Publishes Final Rules on Risk-Based Levies for the Financial Services Compensation Scheme

On September 27, 2016, the PRA issued a Policy Statement relating to implementing risk-based levies for the Financial Services Compensation Scheme deposits. The Policy Statement contains final rules amending the Depositor Protection Part of the PRA Rulebook and a final Statement of Policy on the Financial Services Compensation Scheme and the calculation of firm contributions to the Scheme. The final rules and Statement of Policy are relevant to UK banks, building societies, credit unions, overseas firms with PRA deposit-taking permission and the FSCS (the UK's administrator of its Deposit Guarantee Scheme). The rules applied from October 1, 2016.

Prior to the introduction of the recast Deposit Guarantee Schemes Directive, the FSCS was required to calculate firm levies on the basis of covered deposits. The recast DGSD provides that contributions to a deposit guarantee scheme should also be adjusted relative to the risk incurred by each member of the scheme. The EBA issued Guidelines detailing methods for calculating contributions to schemes. The PRA's rules and Statement of Policy take into account the EBA Guidelines and set out the methodology for calculating risk-based levies and their application to the repayment of current and future compensation costs incurred by the FSCS. The methodology uses different calculations depending on the category of firm: CRR firm, credit unions and non-European Economic Area branches. The PRA has made some changes to the rules that were initially proposed in its consultation paper in March 2016, including removing legacy cost levies from the risk-based methodology and making technical amendments to the calculation methodology for credit unions.

The PRA's Policy Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2516.pdf, the PRA's Statement of Policy is available at: http://www.bankofengland.co.uk/pra/Documents/publications/sop/2016/calculatingrbl.pdf and the PRA's final rules are available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps2516app1.pdf.

Derivatives

US Commodity Futures Trading Commission Extends Time-Limited No-Action Relief for Swap Execution Facilities from Certain "Block Trade" Requirements

On October 7, 2016, the US Commodity Futures Trading Commission Division of Market Oversight (DMO) extended time-limited no-action relief to swap execution facilities from certain requirements in the definition of "block trade" in CFTC regulations. Specifically, CFTC regulation section 43.2 defines a "block trade" as, among other things, a publicly

reportable swap transaction that "[o]ccurs away from the registered [SEF's] or [DCM's] trading system or platform and is executed pursuant to the registered [SEF's] or [DCM's] rules and procedures."

Subject to certain conditions, the no-action letter extends time-limited relief to SEFs from the "occurs away" requirement under section 43.2 until November 15, 2017 before 11:59 p.m., Eastern Standard Time, or the effective date of any CFTC action with respect to the issues discussed in this no-action letter. Among other things, the extension will allow the DMO to continue to evaluate best practices and a more permanent solution to the issues involved in screening block trade orders for compliance with risk-based limits including, if appropriate, amendments to CFTC regulations.

Parties to a swap who do not use the SEF functionalities this letter provides must ensure the required pre-execution credit check occurs.

The CFTC staff letter is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-74.pdf.

US Commodity Futures Trading Commission Signs Memorandum of Understanding with UK Financial Conduct Authority to Improve Supervision of Cross-Border Regulated Firms

On October 6, 2016, the CFTC announced that CFTC Chairman Timothy Massad and Andrew Bailey, Chief Executive of the FCA, signed a Memorandum of Understanding (MOU) regarding cooperation and the exchange of information in the supervision and oversight of certain regulated firms that operate on a cross-border basis in the United States and in the United Kingdom.

Through the MOU, the CFTC and FCA express their willingness to cooperate in the interest of fulfilling their regulatory mandates. The scope of the MOU includes the 20 firms registered with the CFTC as swap dealers.

The MOU is available at: http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/cftc-fca-supervisorymou100616.pdf.

US Commodity Futures Trading Commission Expands Interest Rate Swap Clearing Requirement

On September 28, 2016, the CFTC expanded the existing clearing requirement to interest rate swaps through an amendment to regulation 50.4(a), requiring that market participants submit a covered swap for clearing by a derivatives clearing organization. The amendment expanded four interest rate swap classes to require clearing by a DCO: (i) fixed-to-floating interest rate swaps denominated by the Australian dollar, Canadian dollar, Hong Kong dollar, Mexican peso, Norwegian krone, Polish zloty, Singapore dollar, Swedish krona and Swiss franc; (ii) basis swaps denominated in Australian dollars; (iii) forward rate agreements denominated in Norwegian krone, Polish zloty and Swedish krona; and (iv) overnight index swaps (OIS) denominated in Australian and Canadian dollars, as well as US dollar-, euro- and sterling-denominated OIS with termination dates up to three years. Unlike the proposed rulemaking, AUD-denominated forward rate agreements were not included in the final rule. Compliance with the final rule will be phased in over a two-year period according to an implementation schedule based on when analogous clearing requirements will take effect in other jurisdictions

The final rule is available at:
http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister092816.pdf.

A Q&A document is available at:
http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/irsclearing_qa092816.pdf.

US Securities and Exchange Commission Proposes Enhanced Regulatory Framework for Covered Clearing Agencies

On September 28, 2016, the US Securities and Exchange Commission voted to establish enhanced standards for the operation and governance of securities clearing agencies that are deemed systemically important by the Financial Stability Oversight Council or that are involved in complex transactions, such as security-based swaps. Covered securities clearing agencies are required to adopt specific enhancements related to financial risk management,

governance, recovery planning, operations and disclosure to market participants. The rules, if adopted, will come into effect 60 days after the final rule is published in the Federal Register, and covered security clearing agencies would be required to comply with the rule's requirements within 120 days thereafter.

The SEC also voted to propose to apply the enhanced standards to other categories of securities clearing agencies, including all SEC-registered clearing agencies that are central counterparties, central securities depositories or securities settlement systems. Comments are due on the proposed amendments within 60 days of publication of the release in the Federal Register.

The proposed rule is available at: https://www.sec.gov/rules/proposed/2016/34-78963.pdf.

US Commodity Futures Trading Commission Chairman Speaks to SIFMA Annual Meeting Regarding the Agency's Ongoing Work and Rulemaking Efforts

On September 27, 2016, Timothy Massad, Chairman of the CFTC, spoke at the SIFMA annual meeting about clearinghouse regulation, technological changes and finishing Dodd-Frank rulemaking. Massad first highlighted ongoing CFTC work regarding stress testing across multiple clearinghouses to study systemic issues and interdependencies, recovery plans for systemically important clearinghouses and the CFTC's involvement in international coordination regarding clearinghouse recovery and resolution.

He next focused on two technological issues, cyberattack risk and automated trading. He highlighted CFTC rules regarding cyberdefense testing for market infrastructure firms. He also discussed efforts the CFTC has taken to address challenges posed by automated trading including working to finalize Regulation AT, which is designed to address the risk of disruption posed by automatic trading.

Finally, Chairman Massad discussed the CFTC's work finalizing rules required by the Dodd-Frank Act, including the margin rules on uncleared swaps that went into effect on September 1, 2016. He noted that the CFTC is considering lowering the de minimis threshold (i.e., when an entity's swap dealing activities require the entity to register with the CFTC) for swap dealing (from $8 billion to $3 billion). He also noted that the CFTC intends to repropose rules on capital requirements for swap dealers and major swap participants and that he expects the CFTC to issue a rule on certain aspects of cross-border application of swaps rules this fall.

Chairman Massad's remarks are available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-48.

US Federal Reserve Board Proposes Stricter Regulatory Requirements on Firms Engaging in Physical Commodity Activities

On September 23, 2016, the US Federal Reserve Board issued a notice of proposed rulemaking to tighten capital and other regulatory requirements on financial holding companies that participate in physical commodity trading activities, to remove copper from the list of metals that bank holding companies are permitted to own and store as an activity closely related to banking and to rescind previous orders authorizing certain FHCs to engage in energy management services and tolling activities. A Federal Reserve Board staff memo on the proposed rule published on the same day identified fourteen FHCs that presently have the authority to engage in various physical commodity activities. As justification for the proposed rule, the Federal Reserve Board stated that legal risks associated with physical commodities activities can, at times, exceed the committed capital and insurance policies of the FHC, and that risk, along with other legal and reputational risks, can pose a threat to the safety and soundness of an FHC engaged in physical commodity activities.

In addition, the Federal Reserve Board proposed to rescind specific authorization to the five FHCs that have been authorized to participate in energy tolling and energy management services. The Federal Reserve Board is reconsidering whether those activities are complementary to financial activities as is physical commodity trading. The Federal Reserve indicated that these activities do not support and are not directly related to otherwise permissible commodities

derivatives activities or other financial activities. Comments on the proposed rule must be submitted by December 22, 2016.

The text of the proposed rule is available at:
http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160923a2.pdf.

The text of the staff memo is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160923a1.pdf.

US Chamber of Commerce's Center for Capital Markets Competitiveness Writes Letter to Federal Reserve Board Regarding Proposed Repeal of Merchant Banking Authority

On September 19, 2016, the Center for Capital Markets Competitiveness of the US Chamber of Commerce wrote a letter to Scott Alvarez, General Counsel of the Federal Reserve Board, requesting that the Federal Reserve Board withdraw its report, issued pursuant to Section 620 of the Dodd-Frank Act, advocating for a repeal of merchant banking authority for financial holding companies.

The letter noted that there was no opportunity for stakeholders to comment on the proposed removal of merchant banking authority, and alleged that the Federal Reserve Board, by presenting the contents of the letter as a policy recommendation to Congress, "short-circuited" the notice-and-comment procedure. The Center also alleged that the Federal Reserve Board failed to identify the benefits of repealing merchant banking authority in the report, unjustly presenting a one-sided case for its recommendations to Congress.

The Center also took issue with the substance of the proposal, arguing that repealing merchant banking authority would deny companies access to capital at a time when credit is already difficult to access, particularly in light of what the Center characterized as "hypothetical" risks in comparison to the "real" benefits of merchant banking. The letter concludes by recommending that the Federal Reserve Board withdraw its report and hold a series of public meetings to develop a "more robust" recommendation on merchant banking policy.

The text of the letter is available at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2016/09/2016-9.19-Sec-620-Fed-Letter.pdf.

European Commission Adopts Technical Standards on Margin for Uncleared Derivatives

On October 4, 2016, the European Commission adopted Regulatory Technical Standards on risk mitigation techniques for uncleared OTC derivatives. The European Market Infrastructure Regulation requires counterparties to uncleared OTC derivative transactions to implement risk mitigation techniques to reduce counterparty credit risk. These RTS prescribe the regulatory margin amounts to be posted and collected and the methodologies by which the minimum amount of initial margin and variation margin should be calculated as well as outlining a broad list of securities eligible as collateral for the exchange of margins, such as sovereign securities, covered bonds, specific securitizations, corporate bonds, gold and equities.

The Joint Committee of the European Supervisory Authorities submitted final draft RTS to the Commission on March 8, 2016. The Joint Committee is made up of the EBA, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority. On July 28, 2016, the European Commission requested the ESAs to amend the final draft RTS and submit a modified version for approval. The ESAs rejected many of the proposed amendments in an Opinion published on September 8, 2016, including certain amendments relating to concentration limits on initial margin for pensions scheme arrangements, the proposed amendments to the calculation of the threshold against non-netting jurisdictions, amendments relating to the treatment of covered bonds and the treatment of bilateral derivative contracts where a counterparty is a CCP, transactions with third country counterparties and the process for regulators on the exemption of intragroup derivative contracts.

Implementation of the EU rules on margin for uncleared derivatives was originally intended to align with the international timeline which would have seen the EU rules apply from 1 September 2016. Implementation dates will now depend on whether the European Parliament or Council of the European Union object to the RTS as adopted by the European Commission. Both of those bodies have until January 4, 2017 to consider whether to object to the adopted RTS. Either of them may extend that period for a further three-month period. However, if both the European Parliament and the Council inform the Commission before January 4, 2017 that they do not object to the adopted RTS, then the requirements will enter into force earlier. The RTS must be published in the Official Journal of the European Union before they can enter into force.

The adopted RTS provide for the largest counterparties to begin providing and collecting margin one month after the RTS enter into force. The requirements relating to variation margin will apply from one month after the RTS enter into force where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 3 000 billion. For all other counterparties, the variation margin requirements will apply from the latest of 1 March 2017 or one month after the RTS enter into force.

The requirements relating initial margin will be phased in according to the following timetable:

- from one month after the RTS enter into force where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 3 000 billion;
- from 1 September 2017 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 2 250 billion;
- from 1 September 2018 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 1 500 billion;
- from 1 September 2019 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 750 billion;
- from 1 September 2020 where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of uncleared OTC derivatives above EUR 8 billion.

The adopted RTS on margin for uncleared derivatives is available at:
http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-6329-EN-F1-1.PDF.

Enforcement

CEO and Chairman of Wells Fargo Testifies Before the US Senate Banking Committee

On September 20, 2016, Wells Fargo CEO and Chairman John Stumpf, US Comptroller of the Currency Thomas J. Curry and CFPB Director Richard Cordray each testified before the US Senate Banking Committee in a hearing entitled “An Examination of Wells Fargo’s Unauthorized Accounts and the Regulatory Response.” In his testimony, Comptroller Curry stated that he had directed the US Office of the Comptroller of the Currency examiners to review the sales practices of all large and mid-size banks supervised by the OCC in order to “assess the sufficiency of controls with respect to sales practices.” In addition, Comptroller Curry noted that the discoveries at Wells Fargo “demonstrate the importance of aligning incentives with appropriate behavior, which highlights the need to finalize the interagency incentive compensation rule sooner rather than later.”

Additionally, during the hearing Senators questioned Mr. Stumpf on issues of executive accountability, compensation clawbacks, the validity of “cross-selling” products and business lines and bank regulator accountability. Mr. Stumpf also provided testimony before the US House of Representatives Financial Services Committee on Thursday, September 29, 2016.

More information regarding the hearing is available at: http://www.banking.senate.gov/public/index.cfm/2016/9/an-examination-of-wells-fargo-s-unauthorized-accounts-and-the-regulatory-response.

The full text of Comptroller Curry's oral statement is available at: https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-115.pdf.

UK Financial Conduct Authority Fines Aviva for Client Asset and Money Failings

On October 5, 2016, the FCA published the final notice issued to Aviva Pension Trustees UK Limited and Aviva Wrap UK Limited, fining the firms £8,246,800 for failing to have adequate controls and oversight arrangements to effectively control the outsourcing of administration of client money and external reconciliations of custody assets to Third Party Administrators and for failing to arrange adequate protection for client money and safe custody assets for which they were responsible. The FCA's Client Assets Sourcebook (CASS) rules aim to protect client money and custody assets if a firm becomes insolvent. Where a firm outsources its client asset and money administration, it remains responsible for ensuring that the FCA's rules are complied with. Whilst in this instance there was no loss of client money, the FCA deemed the failings to be especially serious, given that Aviva's annual external CASS reports had identified the breaches for consecutive years.

The FCA's final notice is available at: https://www.fca.org.uk/publication/final-notices/aviva-pension-trustees-uk-limited-aviva-wrap-uk-limited.pdf.

Financial Crime

US Comptroller of the Currency Discusses Bank Secrecy Act and Anti-Money Laundering Compliance

On September 28, 2016, the US Comptroller of the Currency, Thomas J. Curry, spoke at a conference of the Association of Certified Anti-Money Laundering Specialists about the OCC's role in the BSA/AML regulatory regime and the risks the regime is meant to curtail. Curry noted that risks in the BSA and AML space are increasing and that banks must have effective systems for BSA and AML management and timely reporting. He cautioned against overly reactionary "de-risking," where institutions shrink their exposure to high risk geographies and customers, warning that it can lead to entire regions being excluded from the global financial system.

Curry noted that regulators can work with banks they supervise to help them maintain and enhance risk-management systems by communicating expectations clearly. He highlighted specific actions regulators have recently taken, including the joint fact sheet published by the US Treasury on the BSA and AML examination process regarding foreign correspondent banking. He also highlighted upcoming OCC guidance that will clearly lay out the risk management expectations for banks regarding their foreign correspondent portfolios, including best practices for banks on governance, communications and risk mitigation regarding correspondent accounts. Curry closed by reiterating the key points from the joint fact sheet, namely that the OCC, like its fellow federal regulators does not follow a "zero-tolerance" approach to enforcement, and that a decision to terminate a banking relationship or exit a line of business lies solely with a bank.

The text of Comptroller Curry's speech is available at: https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-117.pdf.

Final EU Guidelines on Information Regarding Commodity Derivatives and Spot Markets

On September 30, 2016, ESMA published a Final Report and final Guidelines on information expected or required to be disclosed on commodity derivatives markets or related spot markets under the Market Abuse Regulation. This follows the consultation that ESMA undertook in March 2016. MAR replaced the current Market Abuse Directive and its implementing legislation from July 3, 2016. One of the changes that MAR will introduce is the expansion of the definition of inside information relating to commodity derivatives to cover price sensitive information relevant to the

related spot commodity contracts as well as the derivative. This means that transactions in commodity derivatives based on inside information relating to underlying spot transactions will be expressly prohibited. In addition, the market manipulation prohibitions will include transactions in derivatives markets that manipulate the related spot commodity transaction and transactions in spot commodity markets that manipulate the related derivative. Under MAR, market participants must disclose such information to the public, with delay or selected disclosure allowed in only limited exceptions. The definition of inside information for commodity derivatives includes information which is "reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets." ESMA's Guidelines set out the types of information that would be considered inside information for commodity derivatives or spot transactions by establishing a non-exhaustive indicative list of information that would be reasonably expected or required to be so disclosed. Examples include information relating directly to commodity derivatives, information relating indirectly to commodity derivatives without a related spot market and information directly relating to a spot commodity contract. The Guidelines will apply to national regulators and to commodity derivatives market participants such as investors, financial intermediaries, operators of trading venues and persons professionally arranging and executing transactions in commodity derivatives. The Guidelines will apply from two months after the translations into the official languages of the EU have been published.

The Guidelines are available at: https://www.esma.europa.eu/document/final-report-mar-guidelines-commodity-derivatives.

Former Investment Portfolio Manager Charged by UK Regulator with Insider Dealing

On September 29, 2016, the FCA announced that it had instituted criminal proceedings against Mark Alexander Lyttleton for alleged insider dealing. Mr. Lyttleton was an Investment Portfolio Manager at Blackrock Investment Management (UK) Ltd. The FCA has charged Mr. Lyttleton with three counts of insider dealing pursuant to the Criminal Justice Act 1993. The actions of Mr. Lyttleton in question relate to trading in equities and a call option between October 2, 2011 and December 16, 2011. The criminal offense of insider dealing is punishable by a fine or up to seven years imprisonment.

The press release is available at: https://www.fca.org.uk/news/press-releases/former-investment-portfolio-manager-charged-insider-dealing.

Report to G20 on Beneficial Ownership

On October 7, 2016, the Financial Action Task Force published a report to the G20 Finance Ministers and Central Bank Governors updating them on the steps being taken by the FATF on implementation of international standards on transparency and beneficial ownership. In April 2016, the G20 Finance Ministers and Central Bank Governors requested the FATF and the Global Forum on Transparency and Exchange of Information for Tax Purposes to make initial recommendations by October 19, 2016 on ways to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information, and its international exchange. The report states that many countries still do not implement the beneficial ownership requirements effectively. Therefore, the FATF has committed to focus on beneficial ownership in the FATF peer review follow-up process, to deliver recommendations on how countries can improve their implementation of beneficial ownership requirements and to improve cooperation between the FATF and the Global Forum to improve transparency on beneficial ownership. The FATF will be considering the initial recommendations further at its meeting on October 19, 2016. The FATF is also calling on the G20 members to issue a public commitment to meet the FATF standards on beneficial ownership because, in the FATF's view, prevention of the abuse of corporate vehicles can only be remedied by individual countries.

The report on beneficial ownership is available at: http://www.fatf-gafi.org/media/fatf/documents/reports/G20-Beneficial-Ownership-Sept-2016.pdf.

G20 Anti-Corruption Action Plan 2017-2018 Published

On September 27, 2016, the G20 published its Anti-Corruption Action Plan for 2017-2018 and called on countries to implement the United Nations Convention against Corruption. The G20 established the Anti-Corruption Working Group in 2010, a body which is guided by rolling two-year action plans. The new Action Plan outlines areas of priority for the G20 and the Working Group, which amongst other things, include seeking to promote concrete and practical action to achieve enforcement of anti-corruption laws by taking steps to improve co-operation between law enforcement and other relevant authorities within and between member countries, implementing the Financial Action Task Force Recommendations on Transparency and Beneficial Ownership of Legal Persons and continuing to focus on combatting bribery and exploring the possible adherence of all G20 countries to the OECD Anti-Bribery Convention. The Working Group has been tasked with preparing a more detailed implementation plan, so that progress with the priorities can be tracked. It will report in 2017, on progress in implementing the commitments.

The Action Plan is available at: http://www.g20.org/English/Documents/Current/201609/t20160927_3508.html.

Financial Market Infrastructure

Bank of England Consults on Reform of Sterling Overnight Index Average Interest Rate Benchmark

On October 10, 2016, the Bank of England published a consultation paper on the Bank's proposals to reform the Sterling Overnight Index Average Interest Rate Benchmark, known as SONIA. The BoE, which took over as administrator of SONIA on April 25, 2016, notes that despite being viewed as critical for the sterling financial markets, SONIA is currently based on a market for brokered deposits which has limited transaction volumes. The consultation builds on the Bank's earlier consultation in mid-2015, where it proposed that SONIA should capture a broader range of unsecured overnight deposits by including bilaterally negotiated transactions alongside brokered transactions. The Bank is seeking feedback on its proposals in four areas: (i) the SONIA calculation methodology: the Bank is proposing to switch the current calculation to measuring the average rate using a volume-weighted median, rather than a volume weighted mean; (ii) the definition of SONIA: the Bank is proposing to amend the definition of SONIA to reflect recent EU and IOSCO benchmark regulatory reforms and to account for international best practices for benchmark administration; (iii) transition planning: the Bank is working with market participants to transition from the current benchmark to the proposed reformed SONIA between October and December of 2017; and (iv) publication policies: the Bank is proposing to publish SONIA at 9:00 a.m. on the business day following the business to which the data pertains and to charge users who receive SONIA data on a timely basis directly from the Bank. Responses to the consultation are due by December 31, 2016. The Bank is expected to publish the final methodology for and definition of SONIA, the transition arrangements and the publication and licensing arrangements in early 2017.

The consultation paper is available at: http://www.bankofengland.co.uk/markets/Documents/soniareformcp1016.pdf.

Financial Services

US Office of the Comptroller of the Currency Releases Risk Reevaluation Guidance for Foreign Correspondent Banking

On October 5, 2016, the OCC issued risk management guidance to national banks, federal savings associations and federal branches and agencies regarding the periodic reevaluation of risks in connection with providing correspondent banking accounts for foreign banks. The guidance provides a collection of best practices for banks to consider when undertaking such periodic reevaluations and when determining whether to retain or terminate certain accounts. Such practices include, among others, communicating these decisions to bank senior management with consideration given to potential international financial inclusion impacts, considering mitigating information obtained from foreign financial institutions and ensuring a clear audit trail of the reasons and method used for account closure.

The guidance restates the OCC's supervisory expectation that banks assess risks associated with foreign correspondent banking as part of their on-going risk management and due diligence practices. As a general matter, decisions to retain or terminate banking relationships reside with the bank. The OCC does not direct banks to open, close or maintain individual accounts without regard to the risks presented by an individual customer or the bank's ability to manage the risk.

The OCC guidance is available at: https://occ.gov/news-issuances/bulletins/2016/bulletin-2016-32.html.

US Federal Reserve Board Chair Janet Yellen Testifies Before House Committee on Financial Services

On September 28, 2016, Janet Yellen, Chair of the Federal Reserve, testified before the Committee on Financial Services of the US House of Representatives. Yellen began by discussing the Federal Reserve Board's efforts to strengthen regulation on the largest financial institutions, specifically efforts to strengthen the resiliency and provide for the resolvability of large and complex institutions. She discussed several changes to the Comprehensive Capital Analysis and Review program that have been made or are being contemplated by the Federal Reserve Board. She also highlighted efforts to reduce and streamline regulatory requirements applicable to community banks and proposed that Congress consider carving out community banks from the Volcker Rule and the incentive compensation limits of the Dodd-Frank due to the lower likelihood of the presence at community banks of the sorts of risks those provisions guard against. Yellen closed by briefly discussing current conditions in the financial system. She highlighted the improved financial conditions and funding positions of US G-SIBS, as well as the facts that large and regional banks are well capitalized and increasing in profitability and that community banks are significantly healthier and returning to profitability.

A Federal Reserve Board transcript of Chair Yellen's testimony is available at: http://www.federalreserve.gov/newsevents/testimony/yellen20160928a.htm.

Bipartisan Policy Centers Releases Report on Financial Regulation

On September 26, 2016, the Bipartisan Policy Center, a US-based non-profit organization, issued a paper entitled "Did Policymakers Get Post-Crisis Financial Regulation Right?" The paper analyzes the effects of financial regulation post-financial crisis and reported that, as a general matter, consumers are better protected than before the crisis but that there were increased barriers to affordable credit. In addition, the paper reported on unintended consequences of increased financial regulation, including the curtailment or shift of certain activities from banks to nonbank providers and a lack of coordination on rulemaking. Finally, the BPC recommended that the next president and Congress instruct regulators and appoint an independent commission to conduct a formal assessment of the post-crisis financial regulatory structure.

The BPC paper is available at: http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/09/BPC-FRRI-Post-Crisis-Financial-Regulation.pdf.

US Treasury Secretary Testifies before US House Financial Services Committee

On September 22, 2016, the US Treasury Secretary testified before the US House Financial Services Committee regarding the 2016 FSOC Annual Report. Secretary Lew's remarks included a discussion of the forward-looking approach taken by FSOC and its efforts to engage with stakeholders and the public and to avoid "one-size fits all" regulations. Members of the House Financial Services Committee questioned Secretary Lew on a variety of topics, focusing on the categorization of "Too Big to Fail" and the designation of systemically important financial institutions. In addition, the committee asked Secretary Lew for his views on the joint Federal Reserve Board, FDIC, and OCC report to Congress which recommended repealing the authority for bank holding companies to engage in merchant banking activities. Secretary Lew distanced himself from the report, stating that the Treasury was not involved in its preparation.

The text of the Secretary Lew's opening remarks is available at: http://financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-jlew-20160922.pdf.

EU Authority Publishes Model Arrangements for Benchmark Colleges

On October 3, 2016, ESMA published Model Written Arrangements for Benchmark Colleges (dated September 30, 2016). The Benchmark Regulation requires the national regulator of a benchmark administrator that provides a critical benchmark to establish a college of regulators. ESMA will be a member of each of the colleges. The Model Written Arrangements are intended to provide a framework for establishing a college and for the exchange of information between the relevant regulators.

The Model Written Arrangements are available at: https://www.esma.europa.eu/sites/default/files/library/2016-1414_methodological_framework_written_arrangements_for_benchmark_colleges.pdf.

Proposed EU Technical Standards Under the Benchmark Regulation

On September 29, 2016, ESMA published for consultation the draft technical standards it is required to prepare under the Benchmark Regulation. The Benchmark Regulation sets out the authorization and registration requirements for benchmark administrators, including third country entities, and requirements for governance and control of administrators. It provides for different categories of benchmarks depending on the risks involved, imposes additional requirements on benchmarks considered to be critical and gives powers to national regulators to mandate, under certain conditions, contributions to or the administration of a critical benchmark.

ESMA is consulting on drafts of the following technical standards:

- RTS on the detailed procedures and characteristics of the oversight functions that benchmark administrators are required to set up, including a non-exhaustive list of governance arrangements that are appropriate for an oversight function;
- RTS on how administrators providing benchmarks are to ensure that input data is appropriate and verifiable and that a contributor has internal oversight and verification procedures in place where input data is contributed from a front office function;
- RTS on information to be provided on key elements of methodology, internal review of methodology and the procedure to consult on material changes of methodology in relation to an administrator's obligation to develop, operate and administer the benchmark and methodology transparently;
- RTS on the elements of the codes of conduct that a benchmark administrator is required to develop for each different type of benchmark, including the responsibilities of contributors in relation to input data, record keeping, suspicious input data reporting and conflict management requirements;
- RTS on the governance and control arrangements that supervised contributors to benchmarks need to comply with;
- RTS on the criteria to be assessed by national regulators when deciding to apply certain provisions of the Benchmark Regulation to a significant benchmark where the benchmark administrator had chosen to exercise its option not to apply those provisions to that benchmark;
- ITS on a template for compliance statements to be used by an administrator of benchmarks where it has chosen not to apply some of the provisions of the Benchmark Regulation;
- RTS on the contents of a benchmark statement that an administrator is required to publish when it begins to provide a benchmark in the EU as well as when such statement must be updated;
- RTS on the information to be provided in an administrator's application for authorization or registration; and

- RTS on the form and content of the application for recognition with the national regulator of the Member State of reference by an administrator located in a third country.

The consultation closes on December 2, 2016. ESMA will consider the responses to the consultation in preparing the final technical standards for submission to the European Commission by April 1, 2017. For the most part, the Benchmark Regulation will apply from January 1, 2018. Certain provisions, giving powers to ESMA to prepare draft technical standards and to the Commission to adopt delegated legislation, applied from June 30, 2016. The technical standards will apply from January 1, 2018.

The consultation paper is available at: https://www.esma.europa.eu/press-news/consultations/consultation-draft-technical-standards-under-benchmarks-regulation.

FinTech

US Federal Reserve Board Governor Delivers Remarks on Distributed Ledger Technology

On October 7, 2016, as part of remarks delivered at an Institute of International Finance panel on blockchain, US Federal Reserve Board Governor Lael Brainard addressed distributed ledger technology, noting that this technology may represent the most significant development in many years in payments, clearing and settlement. Brainard highlighted the payments system as an important area of oversight, noting that the Federal Reserve Board wants to maintain public confidence in the payments system, while supporting innovation that provides broadly shared benefits to the public over time, including through the reduction of unnecessary frictions, costs and delays.

Among other things, Brainard discussed several use cases that the Federal Reserve Board has explored in its discussions with industry stakeholders in order to illustrate the potential of distributed ledger technologies, as well as the considerations that are important to the Federal Reserve Board in its assessment of benefits and risks. Regarding risk associated with the use of distributed ledgers, Brainard stated that, "[w]hat matters to us as policymakers and regulators is not only whether the migration to a new technological platform increases or reduces risks, but also whether risks are rendered more or less opaque, and how they are distributed among and between financial intermediaries and end users."

Brainard noted that going forward, the Federal Reserve Board will deepen its engagement with a range of financial institutions and other stakeholders to refine its understanding of the new technologies, and will focus specifically on is responsibilities for the payments system, as well as its oversight of financial market intermediaries. The Federal Reserve Board also expects to publish a research paper later this year that summarizes some of the key findings from its industry engagement on this topic thus far.

Governor Brainard's remarks are available at:
https://www.federalreserve.gov/newsevents/speech/brainard20161007a.htm.

Representative Patrick McHenry of the US House of Representatives Introduces Fintech Legislation

On September 22, 2016, Representative Patrick McHenry (R-NC), introduced a bill entitled "Financial Services Innovation Act of 2016," that would, among other things, establish Financial Services Innovation Offices (FSIOs) at applicable agencies in order to (i) support the development of financial innovations and (ii) establish procedures to streamline the time and cost of financial innovations. In addition, the proposed legislation includes a petition process through which covered persons (i.e., anyone offering financial services innovation products or services that submits a petition to an FSIO) may request a waiver from any regulation by submitting required information, including an alternative compliance strategy.

The full text of the proposed legislation is available at:
https://www.theclearinghouse.org/~/media/Action%20Line/Documents/Volume%20VII/20160922_McHenry_fintech_bill.pdf.

MiFID II

Final EU Guidelines on Transaction Reporting, Order Record Keeping and Clock Synchronization Published

On October 10, 2016, ESMA published a Final Report providing its responses to the feedback on the proposed Guidelines on transaction reporting, order record keeping and clock synchronization under the MiFID II package. The final Guidelines were also published. The MiFID II package, which comprises the Markets in Financial Instruments Regulation and the revised Markets in Financial Instruments Directive as well as the related technical standards, imposes transaction reporting and order record keeping obligations on investment firms, approved reporting mechanisms, trading venues and systematic internalizers. The Guidelines focus on the preparation of transaction reports and order data records for various scenarios and aim to harmonize across Member States the approach to compliance with the MiFID II requirements. The Guidelines also include examples for reporting specific financial instruments with a focus on derivatives and provide further clarification on specific legislative provisions in the MiFID II package, on terms such as "reportable events" and "gateway-to-gateway latency." The Guidelines will apply from January 3, 2018 in line with the application date of the MiFID II package.

ESMA's Final Report and final Guidelines are available at: https://www.esma.europa.eu/press-news/esma-news/esma-provides-guidance-transaction-reporting-order-record-keeping-and-clock.

European Securities and Markets Authority Consults on Proposed Guidelines on Trading Halts under MiFID II

On October 6, 2016, ESMA published draft Guidelines on trading halts by regulated markets under the revised Markets in Financial Instruments Directive. MiFID II requires regulated markets to temporarily halt or constrain trading if there is a significant price movement in a financial instrument (equity, equity-like and debt instruments) on that market or a related market in a short period. Regulated markets must also, in exceptional cases, cancel, vary or correct any transaction. ESMA is required to develop Guidelines on the calibration of those trading halts, taking into account the liquidity of the different asset classes and sub-classes, the nature of the market model and types of users. ESMA is also proposing Guidelines, at its own initiative, which set out how trading halts should be communicated to market participants and other venues and on the procedure and format of submissions by regulated markets to national regulators setting out the parameters for halting trading. The Guidelines will apply to national regulators, trading venues (regulated markets, MTFs and OTFs) and all trading systems allowing or enabling algorithmic trading. The consultation closes on December 6, 2016. ESMA intends to finalize the Guidelines in Q1 2017.

The consultation paper is available at: https://www.esma.europa.eu/press-news/consultations/consultation-guidelines-calibration-publication-and-reporting-trading-halts.

European Securities and Markets Authority Consults on Draft Guidelines for Management of Exchanges and Data Reporting Service Providers

On October 5, 2016, ESMA published draft Guidelines on the requirements for the management body of market operators and Data Reporting Services Providers respectively. The revised Markets in Financial Instruments Directive requires all members of the management body of any market operator to be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties, to commit sufficient time to perform their functions and to act with honesty, integrity and independence of mind. Market operators must also promote diversity and allocate adequate human and financial resources to the induction and training of the management body. Similar requirements are placed on the management body of DRSPs but DRSPs are not required to promote diversity and allocate adequate human and financial resources to the induction and training of the management body.

The proposed Guidelines will apply to the management body of market operators which are the individuals who operate a regulated exchange and to DRSPs. Investment firms operating a multilateral trading facility, an organized trading facility or banks operating a trading venue will not be subject to the proposed Guidelines. Instead the management bodies of operators of these other types of trading venues will be subject to separate Guidelines developed under other provisions of MiFID II and the Capital Requirements Directive which ESMA and the European Banking Authority are expected to consult on soon. The consultation closes on January 5, 2017. ESMA will consider the feedback it receives and intends to publish a final report in Q1 or Q2 2017.

The consultation paper is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-requirements-management-trading-venues-and-reporting-services.

European Securities and Markets Authority Consults on Proposed Guidelines on Product Governance Requirements under MiFID II

On October 5, 2016, ESMA published draft Guidelines on the target market assessment for the new product governance requirements in the revised Markets in Financial Instruments Directive. The product governance requirements require firms which manufacture and distribute financial instruments and structured deposits to act in their clients' best interests during all the stages of the life-cycle of products or services. The requirements in MiFID II were further specified in secondary legislation which was adopted by the European Commission in April 2016. ESMA's proposed Guidelines focus on the 'target market assessment', which has been identified as the most important for achieving consistent application of the product governance requirements across the EU.

The proposed Guidelines set out, amongst other things, the determination of the potential target market by the manufacturer or distributor in terms of categories to be considered and differentiation on the basis of the nature of the product manufactured or distributed, regular reviews to assess whether products and services are reaching the target market and the distribution of products manufactured by entities not subject to the MiFID II product governance requirements by MiFID II distributor firms. ESMA has also included practical examples and case studies on the application of certain aspects of the proposed Guidelines. The consultation closes on January 5, 2017. ESMA will consider the feedback it receives and intends to publish a final report in Q1 or Q2 2017.

The consultation paper is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-product-governance-guidelines-safeguard-investors.

European Securities and Markets Authority Publishes Technical Standards on Consolidated Tape for Non-Equity Financial Instruments

On October 3, 2016, ESMA published a consultation paper containing draft RTS specifying the scope of the consolidated tape for non-equity financial instruments under the Markets in Financial Instruments Directive II. The RTS on the scope of tape for equity instruments was previously endorsed by the European Commission on June 2, 2016. ESMA's proposed draft RTS will amend the endorsed RTS on the equity consolidated tape by adding a list of non-equity asset classes that are to be included in the CTP electronic data stream. The list includes classes of bonds (excluding exchange traded commodities and notes), structured finance products, securitized derivatives, interest derivatives, foreign exchange derivatives, contracts for differences and emission allowances.

Trading venues and approved publication arrangements will send real-time post-trade data to consolidated tape providers, who will then consolidate such data in real time and make the consolidated tape available to the public. The draft RTS specifies criteria to determine the inclusion of a trading venue or APA into a consolidated tape: whether the volume or number of the transactions published for a relevant non-equity asset class is equal to or larger than 2.5% of the total number of transactions in that relevant asset class published in the EU by all APAs and trading venues during the same period. RTS propose that APAs and trading venues satisfying either of the threshold criteria must publish their results on their website by March 1, 2019 and September 1, 2019 (and on the same dates annually thereafter). A CTP will be required to include such data in its electronic data stream as soon as possible, or at the latest, six-months after the

criteria has been met. The draft RTS permits CTPs to remove an APA or trading venue from its data stream where it fails to meet the necessary criteria for three consecutive six-month assessment periods. Responses to the consultation are due by December 5, 2016.

The consultation paper is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-consolidated-tape-non-equity-products.

UK Financial Conduct Authority Consults Further on Implementation of MiFID II

On September 29, 2016, the FCA launched its third consultation on the implementation of the revised Markets in Financial Instruments Directive in the UK. The consultation paper is split into two parts. The first part is on conduct of business requirements and covers topics such as inducements, research, client categorization, disclosure requirements, independence, dealing and managing, suitability, appropriateness and investment research. The second part covers a range of issues such as product governance, supervision and authorization, knowledge and competence requirements and perimeter guidance.

The FCA's conduct of business proposals follow on from its Discussion Paper published last year which covered two general issues: whether the MiFID II conduct rules should apply to insurance-based investments and pensions and whether the MiFID II rules applicable to the activities of advising on or selling structured products should be incorporated into the FCA's Conduct of Business sourcebook. On the first issue, the FCA has decided to wait until EU implementing measures under the Insurance Distribution Directive are finalized before it sets out its proposals. The FCA is intending to consult on implementing the IDD in 2017. On the second issue, the FCA has decided to proceed with incorporating such MiFID II rules into the Conduct of Business sourcebook. The FCA is proposing to apply individual conduct rules to those activities, which is in line with the provisions in MiFID II.

The FCA explains its approach to applying analogous requirements to firms that are exempt from MiFID II under the optional exemptions available at a Member States' discretion. These are firms which provide investment advice and/or receive and transmit client orders for a limited range of financial instruments, which do not hold client assets or money and do not do business outside of the UK. MiFID II requires Member States that have chosen not to apply MiFID II to these firms to implement requirements that are similar to those in MiFID II on authorization and supervision, conduct of business requirements and organizational requirements. The FCA is intending to apply the same conduct rules to these firms as to MiFID investment firms to the extent they are required. The FCA also confirms that the same conduct rules that will apply to MiFID investment firms will also apply to branches of non-EEA firms.

One of the key points emerging from the consultation is the FCA's approach to funding of Research Payment Accounts. MiFID II allows research not to be treated as an inducement if it is received in return for either a direct payment by the investment firm from its own resources or a payment from a separate RPA controlled by the investment firm that meets a number of conditions relating to the operation of that account. The FCA's view is that a PRA can be funded by collecting research charges alongside transaction costs provided that the charge accrues to an RPA. This may have consequences for a firm's Commission Sharing Agreement accounts structure as firms will need to ensure that, for example, research charges deducted through a broker alongside transaction costs are fed to an RPA immediately after the transaction and that any RPA arrangements allow an investment firm to deduct research charges and manage the funds so that it matches the related budget.

The FCA intends to continue with its practice of copying out EU legislation into its Handbook and is proposing to copy out various provisions of the secondary legislation on the conduct provisions into its Handbook.

Responses to the FCA's proposals are due by January 4, 2017, except for the proposals relating to supervision, authorization and approved persons, for which the responses are due by October 31, 2016. The FCA is proposing a revised Form A and feedback on that form will need to be given earlier so that the FCA has time to put the forms in

place for when applications for authorization under MiFID II can be made, which is expected to be in early 2017. The FCA is intending to publish its final rules and a Policy Statement in the first half of 2017. A further consultation on the remaining changes needed to implement MiFID II is expected later in 2016.

The consultation paper is available at: https://www.fca.org.uk/sites/default/files/cp16-29.pdf.

Payment Services

US Federal Reserve Board Task Forces Begin Review of Faster Payments Solution Proposals

On October 4, 2016, nearly 500 members of two national task forces convened by the US Federal Reserve Board began their review of nineteen proposals submitted by interested task force members across the payments industry that outline potential approaches for a faster payment system in the United States.

One task force is focused on faster payment capabilities, while the other is working to enhance payment system security. The review by the two task forces, each of which includes representatives of financial institutions, consumer groups, payment service providers, financial technology firms, businesses, government agencies and other interested parties, follows an independent analysis of the proposals by a global consulting firm, which assessed the proposals against 36 effectiveness criteria created by members of both task forces earlier this year.

A final two-part report is expected to result from the Faster Payments Task Force work effort. The first section, slated for release in January 2017, will describe the task force history and background. The report will detail gaps in the current payments landscape, identify opportunities for improvements and outline the benefits to the public of a faster payment system and the needs it would serve.

The second section of the final report, targeted for release in mid-year 2017, will include a discussion and assessment of the specific proposals, offering models of what an end-to-end faster payment system in the United States could look like and demonstrating how each proposal measured up against the various effectiveness criteria. This section will also identify strategic issues deemed important to the successful development of faster payments in the United States and recommend industry actions required to advance their implementation and adoption.

The Federal Reserve Board press release is available at:
http://www.federalreserve.gov/newsevents/press/other/20161004a.htm.

UK Payment Systems Regulator Publishes Final Guidance on the European Interchange Fee Regulation

On October 6, 2016, the UK Payment Systems Regulator published the final Guidance on its approach to monitoring compliance with the EU Interchange Fee Regulation. The final Guidance consolidates the previous final Guidance published in March 2016 on enforcing compliance of the provisions of the Regulation that came into force on December 9, 2015, with the latest Guidance relating to provisions that subsequently came into force on June 9, 2016. The PSR has also published a Policy Statement which summarizes the main responses to the PSR's latest draft Guidance.

The Interchange Fee Regulation imposes caps on interchange fees on consumer debit and credit card transactions where the issuer and acquirer are both located in the EEA. The final Guidance applies to payment card schemes, issuing and acquiring payment service providers, processing entities, other technical service providers and merchants. The final Guidance focuses on provisions capping interchange fees or equivalent issuer compensation and the business rules provisions, defines the two broad types of card schemes which are subject to the Regulation (four-party schemes and certain three-party schemes) and outlines the interchange fee caps that apply to domestic and cross-border debit and credit card transactions. Interchange fees include both direct and indirect payments from acquirers to issuers. Furthermore, the final Guidance expands on the temporary exemption from domestic interchange fee caps applicable to certain three-party schemes. The final Guidelines also explain the application of the business rules provided by the

Regulation on areas such as licensing, separation of payment card schemes and processing entities, co badging and choice of payment brand or payment application, unblending and the "Honour All Cards" rule. The final Guidance also outlines the PSRs enforcement powers and procedures under the Regulation and penalties for non-compliance.

The final Guidance is available at: https://www.psr.org.uk/sites/default/files/media/PDF/PSR-IFR-Guidance-Phase-2.pdf and the Policy Statement is available at: https://www.psr.org.uk/sites/default/files/media/PDF/PSR-IFR-Phase-2-Policy-Statement.pdf.

Bank of England Proposes Code of Practice for Recognized Payment System Operators

On September 29, 2016, the BoE published a consultation paper proposing the introduction of a draft Code of Practice and Supervisory Statement on governance in recognized payment system operators. The final Code and the Supervisory Statement will contain the minimum governance requirements and expectations for recognized payment system operators to meet. Recognized payment systems include Bacs, CREST, CHAPS, LINK and Faster Payment Services. The Principles for financial market infrastructures, developed by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions, form the basis of the draft Code although the Bank has also taken into account other sources such as the UK Corporate Governance Code. Amongst other things, the draft Code would require a recognized payment system operator to be a systemic risk manager (by promoting the safety and efficiency of the payment system and supporting the stability of the financial system), review its performance annually and document its governance policies and procedures. It would also set out the requirements for composition of the board and expectations on governance arrangements. It is not intended that the Code would apply to a recognized payment system that is operated by a recognized clearing house or central securities depository because those entities are already subject to similar requirements under EMIR or the Central Securities Depositories Regulation. The BoE is proposing that the Code be implemented 12 months after publication of the final version. The consultation closes on December 2, 2016.

The consultation paper is available at:
http://www.bankofengland.co.uk/financialstability/Documents/fmi/governance_rps.pdf.

Recovery & Resolution

US Federal Banking Agencies Release Public Sections of Resolution Plans for Eight Systemically Important Financial Institutions

On October 4, 2016, the US Federal Reserve Board and the FDIC posted the public portions of the required "targeted submissions" for eight systemically important US banking institutions. This follows the joint determination of the agencies in April of this year that each of the 2015 resolution plans of Bank of America, Bank of New York Mellon, JPMorgan Chase, State Street and Wells Fargo was not credible or would not facilitate an orderly resolution under the US Bankruptcy Code, the standard established in the Dodd-Frank Act. Accordingly, the agencies issued joint letters to these firms detailing the deficiencies in their plans and requisite actions to be taken by the firms to address them. The firms were given until October 1, 2016 to remediate their deficiencies and file a targeted submission to the agencies detailing the remediation. A firm that has not remediated the identified deficiencies may be subject to more stringent prudential requirements.

The agencies jointly identified weaknesses in the 2015 resolution plans of Goldman Sachs, Morgan Stanley and Citigroup that the firms must address in their 2017 resolution plans. These firms were also required to file targeted submissions by the October 1st deadline.

The public portions of the targeted submissions are available at: http://www.federalreserve.gov/bankinforeg/resolution-plans.htm and at: https://www.fdic.gov/regulations/reform/resplans/index.html.

US Office of the Comptroller of the Currency Publishes Final Recovery Plan Guidance

On September 29, 2016, the OCC published a final rule adopting enforceable guidelines for recovery planning by insured national banks, insured Federal savings associations and insured Federal branches of foreign banks with at least $50 billion in average total consolidated assets. The guidelines are effective on January 1, 2017, but are subject to phased-in compliance based on an institution's asset size: six months for institutions with $750 billion or more, 12 months for institutions with $100 billion or more but less than $750 billion, and 18 months for institutions with $50 billion or more but less than $100 billion. The guidelines provide a framework for evaluating the financial impact of a severe stress on an institution, and various measures an institution could implement to be able to withstand such a period of stress.

The recovery plan must address the following elements, among others: triggers reflecting the bank's vulnerabilities, recovery options, impact assessments for each option, escalation procedures, communications procedures and any other information that the OCC communicates in writing to the bank regarding the recovery plan. The OCC noted that it has no specific expectations regarding the length or detail of recovery plans, so long as the plan is specific to the characteristics of each institution. The OCC emphasized that recovery plans should be integrated into a bank's risk governance framework, and a bank should coordinate its recovery plan with its holding company's recovery and resolution planning. The guidelines also call for at least annual review of a bank's recovery plan by management and the bank's board, as well as management review after any material event.

The Federal Register publication of the final rule is available at https://occ.gov/news-issuances/news-releases/2016/nr-occ-2016-118a.pdf.

Shadow Banking

European Securities and Markets Authority Consults on Secondary Measures for Reporting of Securities Financing Transactions

On September 30, 2016, ESMA published a consultation paper on its proposed draft ITS and RTS for the Securities Financing Transactions Regulation. Securities financing transactions involve the use of securities to borrow cash or other higher investment-grade securities, or vice versa. Such transactions can include repurchase transactions, securities lending and sell/buy backs. The purpose of the SFTR is to increase the transparency of such shadow banking activities. The SFTR will require both financial and non-financial market participants to report details of their SFTs to an approved EU trade repository. The draft RTS outlines the procedure and criteria for registration as a trade repository under the SFTR, the use of internationally agreed reporting standards, reporting logic and the main aspects of the structured content of SFT reports, the requirements regarding transparency of data, data collection, aggregation and comparison as well as access levels for different regulators.

The consultation follows a discussion paper that was published in March 2016 and builds on feedback received. ESMA has shortened the specific action types fields required in an SFT report, limiting the number of action types to "Modification of business terms" and "Other modification." With regard to the content and structure of the SFT report, ESMA has proposed an additional clearing data field table to gather more data on SFTs and the reuse of collateral with counterparties to report information on the additional margin posted by the counterparties to SFTs to the CCPs that have cleared their SFTs. The discussion paper included a proposal to link different initial reports related to a single centrally cleared SFT using a common identifier. ESMA proposed to link the reports either by a prior unique transaction identifier (such as the UTI of the pre-novation transaction) or a transaction reference number similar to the one used in the EMIR to group reports which relate to the same executed transaction. The purpose of such reporting is to assist in identifying financial stability risks and monitor the evolution of transactions over time. ESMA noted responses relating to the increased costs in making changes to infrastructure to implement the proposed reporting methods. ESMA has retained the linking proposal and in response has proposed that CCPs would not be required to report the Report

Tracking Number in the case of cleared transactions, the prior-UTI would be reported by counterparties and clearing members only and would not have to be a matching field. This would avoid the need to transfer the Report Tracking Number through the whole chain but would still provide an audit trail. Regulators would, therefore, be able to reconstruct the linked trade without CCPs reporting the original UTI generated by one of the two counterparties.

ESMA is also proposing amendments to the existing RTS on registration and access levels of trade repositories under EMIR to streamline access levels for regulators under EMIR and the SFTR. Responses to the consultation are due by November 30, 2016. ESMA intends to finalize draft RTS and ITS for submission to the European Commission before April 2017.

The consultation page is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-future-reporting-rules-securities-financing-transactions and the discussion paper is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-securities-financing-transaction-regulation.

Upcoming Events

November 7, 2016: European Commission public hearing on review of the EU macro-prudential framework

November 10, 2016: FCA Financial Crime Conference

November 21, 2016: EBA public hearing on proposed technical standards under the PAD (deadline for registration is October 25, 2016)

Upcoming Consultation Deadlines

October 14, 2016: FICC Markets Standards Board consultation on proposed standard on binary options for the commodities markets

October 17, 2016: IOSCO consultation on proposed set of good practices on voluntary termination of investment funds

October 21, 2016: BoE consultation on the proposed EDMC

October 26, 2016: EBA consultation on Connected Clients under the CRR

October 26, 2016: EBA consultation on proposed Guidelines on Bank's Credit Risk Management Practices and Accounting for Expected Losses

October 27, 2016: Comments to US FDIC proposed Guidance on Third-Party Lending

October 28, 2016: FCA consultation on implementation of MiFID II and proposed changes to the FCA Handbook

October 28, 2016: PRA consultation on proposed approach to implementation of the Systemic Risk Buffer

October 28, 2016: OECD working group consultation on draft guidelines for the liability of legal persons for foreign bribery

October 31, 2016: FCA consultation on MiFID II relating to supervision, authorization and approved persons

November 15, 2016: HM Treasury consultation on amending the definition of regulated advice

November 28, 2016: PRA and FCA consultation on remuneration and EBA Guidelines

November 30, 2016: ESMA consultation on draft secondary measures for SFTR

November 21, 2016: ESMA discussion paper on the trading obligation for derivatives under MiFIR

November 30, 2016: EBA consultation on minimum amount of professional indemnity insurance for authorization under the revised PSD

December 5, 2016: ESMA consultation on consolidated tape for non-equity financial instruments

December 13, 2016: FCA consultation on proposed updates to the current appropriate qualification examination standards for financial advisers

December 22, 2016: EBA consultation on proposed draft technical standards supplementing the PAD

December 31, 2016: BoE consultation on reforms to SONIA

January 4, 2017: FCA consultation on implementation of MiFID II

January 6, 2017: EBA consultation on assessment of Information and Communication Technology risk under the Supervisory Review and Evaluation Process

January 9, 2017: PRA and FCA consultation on amendments to the SM&CR

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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