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FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP
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# Financial Regulatory Developments Focus

**In this week's 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.**

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

Click here if you wish to read our quarterly European Governance & Securities Law Focus newsletter.

## In this Issue (please click on any title to go directly to the corresponding discussion):

## Bank Prudential Regulation & Regulatory Capital

### US Federal Deposit Insurance Corporation Issues Proposed Rule to Facilitate Access to Deposits in Large Bank Failures

On February 17, 2016, the US Federal Deposit Insurance Corporation issued a proposal that would require certain insured depository institutions to maintain certain books and records in order to facilitate the payment of insured deposits to customers in the event such institutions were to fail. The proposed rule applies to insured depositary institutions with a large number of deposit accounts (more than 2 million). Based on current data, 36 insured depository institutions would be covered by the rule. The recordkeeping requirements would require the institutions covered by the rule to maintain complete and accurate data on each depositor and would require such institutions to ensure that their information technology systems have the ability to calculate the amount of insured money for each depositor within 24 hours of a failure. Comments on the proposed rule must be received within 90 days after the date of publication in the Federal Register.

The full text of the FDIC proposed rule is available at: https://www.fdic.gov/news/board/2016/2016-02-17_notice_dis_b_fr.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

### US Federal Deposit Insurance Corporation and US Securities Exchange Commission Issues Proposed Rule Regarding the Orderly Liquidation of Covered Broker-Dealers

On February 17, 2016, the FDIC and the US Securities and Exchange Commission jointly issued a proposed rule to implement provisions for the orderly liquidation of covered brokers and dealers as required under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Specifically, Title II provides for federal receivership proceedings of qualifying financial companies, including covered broker-dealers, with the FDIC serving as receiver. The proposed rule defines a covered broker or dealer as any covered financial company that is registered with the SEC as a broker or dealer and is a member of the Securities Investor Protection Corporation. A covered financial company is generally one that is in danger of default and whose failure would have serious adverse effects on US financial stability, as determined by the Secretary of the Treasury. In the case of covered broker-dealer, the FDIC will serve as receiver, but the SIPC will serve as trustee.

Comments on the proposed rule must be received within 60 days after the date of publication in the Federal Register.

The full text of the proposed rule is available at: https://www.sec.gov/rules/proposed/2016/34-77157.pdf.

### US Office of the Comptroller of the Currency Issues Certain Revised Booklets of the Comptroller's Handbook

On February 12, 2016, the US Office of the Comptroller of the Currency issued two revised booklets of the Comptroller's Handbook: the "Country Risk Management" booklet and the "Installment Lending" booklet. Each revised booklet updates and replaces the previous versions of the respective booklets. The "Installment Lending" booklet provides updated guidance to examiners regarding the administration of installment lending practices and the controls and processes necessary to manage the risks associated with those practices as well as updated guidance for assessing the quantity of risk associated with installment lending activities.

The "Country Risk Management" booklet provides updated guidance to examiners regarding country risk management, based on lessons learned from the financial crisis of 2008 as well as the European banking and debt crises. The booklet also updates descriptions of the risks associated with international activities and contains a more detailed discussion of the effects of country risk, cross-border risk and sovereign risk on the OCC's 8 risk categories (credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation).

The full text of the "Installment Lending" booklet is available at: http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-a-il.pdf.

The full text of the "Country Risk Management" booklet is available at: http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-crm.pdf.

### Vice Chairman of the US Board of Governors of the Federal Reserve System Discusses the Role of the Federal Reserve as Lender of Last Resort

On February 10, 2016, Stanley Fischer, the Vice Chairman of the US Board of Governors of the Federal Reserve System gave a speech at a conference sponsored by the Committee on Capital Markets Regulation discussing the function of the Federal Reserve as a lender of last resort in the United States. In his remarks, Vice Chairman Fischer noted that, despite recent developments that have placed limitations on the Federal Reserve's actions as a lender of last resort, the Federal Reserve, when necessary and appropriate, has the authority to act as lender of last resort in several ways. Vice Chairman Fischer noted that the Federal Reserve retains the power to extend discount window loans, either to individual institutions or more generally in order to address broader financial stresses, to insured depository institutions, including commercial banks, thrift institutions, credit unions, or US branches and agencies of foreign banks. Further, the Federal Reserve is also permitted, with the approval of the Secretary of the Treasury, to lend to non-bank institutions through the use of broad-based facilities to provide liquidity to financial markets.

The full text of Vice Chairman Fischer's speech is available at: http://www.federalreserve.gov/newsevents/speech/fischer20160210a.htm.

### US Federal Deposit Insurance Corporation Releases Economic Scenarios for Use in 2016 Stress Testing

On February 9, 2016, the FDIC released the economic scenarios for use by certain covered financial institutions in the 2016 stress tests required under the Dodd-Frank Act. Generally, those financial institutions with total consolidated assets of more than $10 billion are required to conduct stress tests. The released scenarios include key variables that reflect economic activity, such as unemployment, exchange rates, prices, income, interest rates and other economic and financial factors. The FDIC coordinated with the Federal Reserve Board and the OCC, which released the scenarios in late January, in developing and distributing the scenarios.

The FDIC stress test scenarios are available at: https://www.fdic.gov/news/news/press/2016/pr16009.xlsx.

### US Office of Financial Research and the US Financial Stability Oversight Council Hold Annual Conference

On February 5, 2016, the US Office on Financial Research and the US Financial Stability Oversight Council co-sponsored a conference, entitled "Taking Stock of Financial Resilience." The event covered a wide range of issues, including orderly resolution, stress testing beyond banks, central clearing of repurchase transactions, and the changing market structure.

Additional details summarizing the annual conference are available at: https://www.treasury.gov/press-center/media-advisories/Pages/01212014.aspx.

### European Banking Authority on Implementation of Regulatory Review of Internal Ratings Based Approach Models

On February 4, 2016, the European Banking Authority published an Opinion on the implementation of the regulatory review of the Internal Ratings Based approach to calculating risk weighted exposure amounts for credit risk. The Opinion sets out the general principles and timelines for implementation and aims to provide clarity for national regulators and relevant firms. The EBA has also published a report on the future of the IRB approach. Both the Opinion and Report aim to address concerns raised over the lack of comparability of capital requirements determined under the IRB approach across firms as well as identify the main drivers of variability in the implementation of IRB models. The IRB framework will be made up of Regulatory Technical Standards and Guidelines which will be introduced in 2016 and 2017 in four phases: (i) the IRB assessment methodology will be introduced in the first quarter of 2016; (ii) a definition of "default" will be introduced by mid 2016; (iii) estimation of risk parameters and treatment of defaulted

assets will be introduced by mid 2017; and (iv) credit risk mitigation will be introduced by the end of 2017. The EBA expects that the effective implementation in all areas will be finalized by the end of 2020.

The EBA's Opinion and Report are available at: http://www.eba.europa.eu/-/eba-sets-out-roadmap-for-the-implementation-of-the-regulatory-review-of-internal-models.

### Final Draft EU Technical Standards on the Mapping of Credit Assessments of External Credit Assessment Institutions for Securitization Positions Published

On February 15, 2016, the EBA published final draft Implementing Technical Standards on the mapping of assessments by Credit Rating Agencies for securitization positions under the Capital Requirements Regulation. The CRR establishes that the risk weights under the standardized and IRB approach for securitization positions should be based, if applicable, on the credit quality of the positions. This credit quality is determined by reference to the credit ratings of CRAs. The draft ITS determine the mapping between credit ratings and credit quality steps for the allocation of risk weights to External Credit Assessment Institutions' ratings issued on securitizations. The mapping is backed by the results of an impact analysis as well as quantitative considerations. A securitization-specific systematic mapping methodology is also being considered by the EBA and this would be based on the historical performance of securitization ratings. The ITS aim to enhance regulatory harmonization across the EU allowing credit ratings of all registered CRAs to be used for calculating institutions' capital requirements.

The final draft ITS are available at: http://www.eba.europa.eu/documents/10180/1370122/EBA-ITS-2016-02+%28Final+draft+ITS+on+ECAI+mapping+for+securitisation+positions%29.pdf.

## Bank Structural Reform

### US Board of Governors of the Federal Reserve System Proposes IHC Reporting Requirements

On February 5, 2016, the Federal Reserve Board published a notice of proposed rulemaking to collect financial information from US intermediate holding companies of foreign banking organizations. The proposal would require all IHCs to commence reporting of the FR Y 9C (Consolidated Financial Statements for Holding Companies), FR Y 9LP (Parent Company Only Financial Statements for Large Holding Companies), FR Y 11 (Financial Statements of US Nonbank Subsidiaries of US Holding Companies), FR 2314 (Financial Statements of Foreign Subsidiaries of US Banking Organizations), FR Y 12 (Consolidated Holding Company Report of Equity Investments in Nonfinancial Companies) and FR Y 15 (Banking Organization Systemic Risk Report) as of September 30, 2016, reporting of the FR Y 14A/M/Q (Capital Assessments and Stress Testing), FR Y 6 (Annual Report of Holding Companies) and FR Y 9ES (Financial Statements for Employee Stock Ownership Plan Holding Companies) as of December 31, 2016, and Reg Y 13 (Recordkeeping and Reporting Requirements Associated with Regulation Y (Capital Plans)) as of January 1, 2017. The notice of proposed rulemaking is open for comments until April 5, 2016.

The final draft ITS are available at: http://www.eba.europa.eu/documents/10180/1370122/EBA-ITS-2016-02+%28Final+draft+ITS+on+ECAI+mapping+for+securitisation+positions%29.pdf.

## Conduct & Culture

### UK Regulator Extends the Senior Manager and Certification Regime

On February 4, 2016, the Financial Conduct Authority published a Policy Statement and final rules on the application of the Senior Manager and Certification Regimes to wholesale market activities, such as algorithmic and high frequency trading. The SM&CR enter into force on March 7, 2016. The rules apply to banks, building societies and investment firms designated by the Prudential Regulation Authority. The new rules extend the Certification Regime to individuals who carry out two new significant harm functions: (i) the new "client dealing" function, which includes advising on

investments other than non investment insurance contracts and any associated dealing and arranging, acting as an investment manager or acting as a bidder's representative (this new function is subject to the FCA's new definition of "client" which aims to capture all clients, including traditional retail clients); and (ii) "algorithmic trading." Under transitional rules, the Certification regime requires firms to identify the staff members that fall into the two new functions and train them on the new conduct rules by September 7, 2016. The commencement date for the requirement for firms to certify all staff that carry out significant harm functions remains March 7, 2017.

The Policy Statement also sets out the initial feedback received on the PRA and FCA's joint consultation on regulatory references, i.e., employment references passed between firms when an individual moves roles. Regulatory references are also relevant to candidates applying for new roles, including senior management functions, significant harm functions and other roles within insurance firms and credit unions. The joint consultation on regulatory references raised questions that require further consideration, such as a need for transitional arrangements or delayed implementation so that firms have enough time to set up systems and processes to support the new requirements. The FCA is therefore delaying the finalization of the new referencing regime until after the commencement of the SM&CR, though has decided that the existing and specific referencing rules will, as an interim measure, remain in place and come into effect on March 7, 2016. The PRA has also stated that it aims to publish initial rules in mid February 2016 on regulatory referencing (that will apply from March 7, 2016), followed by a second set of rules that would be published together with the FCA on areas that require further consideration.

The FCA's Policy Statement is available at: http://www.fca.org.uk/static/fca/article-type/policy%20statement/ps16-03.pdf.

The PRA's statement is available at: http://www.fca.org.uk/static/fca/article-type/policy%20statement/ps16-03.pdf.

### UK Regulators Joint Policy Statement on Regulatory References, Implementation of Senior Manager and Certification Regimes and Senior Insurance Managers Regime

On February 15, 2016, the PRA and FCA jointly published a Policy Statement on the implementation of the SM&CR, Senior Insurance Managers Regime and the requirements of the PRA on regulatory references. The Policy Statement, amongst other things, sets out a first set of PRA rules on the provision of regulatory references by firms under the SM&CR and SIMR, i.e., employment references passed between firms when an individual moves roles. These PRA rules are set out in Appendix 1 of the Policy Statement and will apply from March 7, 2016. The rules are largely a continuation of the existing requirements under the Approved Persons Regime and should be read and applied together with the FCA's equivalent requirements. The FCA's Policy Statement was published on February 4, 2016 and sets out the feedback received on the PRA and FCA's joint consultation on regulatory references. A second set of rules are expected to be published at a later date and will cover the areas on which feedback received by the PRA is still under consideration.

The PRA and FCA's Policy Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps516.pdf.

The FCA's Policy Statement is available at: http://finreg.shearman.com/uk-regulator-extends-the-senior-manager-and-certi.

### Basel Committee on Banking Supervision Enhances Anti Money Laundering and Countering Terrorist Financing Guidelines

On February 4, 2016, the Basel Committee on Banking Supervision issued the final revised version of the General guide to account opening, first published in 2003. Taking into account enhancements to the Financial Action Task Force Recommendations and other supplementary FATF publications, the guide sets forth procedures for account opening including collecting sufficient customer information to protect against money laundering and terrorism financing. The guide is an annex to the Sound management of risks related to money laundering and financing of terrorism

(BCBS 353) Guidelines published in 2014. The BCBS 353 Guidelines address risk assessment and mitigation, monitoring requirements, customer identification and assessment, management of information, reporting of suspicious transactions and asset freezing, group wide information sharing and AML/terrorist financing policies and procedures, among other topics.

The revised Sound management of risks related to money laundering and financing of terrorism (BCBS 353), which was reissued without change, except for the new Annex IV General Guide to Account Opening is available at: http://www.bis.org/bcbs/publ/d353.pdf.

## Consumer Protection

### US Board of Governors of the Federal Reserve System Repeals Regulation AA and Proposes Repeal of Regulation C

On February 11, 2016, the Federal Reserve Board announced that, as part of the transfer of certain consumer protection rulewriting authority to the US Consumer Financial Protection Bureau under the Dodd–Frank Act, the Federal Reserve Board was repealing Regulation AA (Unfair or Deceptive Acts or Practices). Among other things, Regulation AA contained the Federal Reserve Board's "credit practices rule," which prohibited banks from engaging in certain practices to enforce consumer credit obligations and from including these practices in consumer credit contracts. Separately, the Federal Reserve Board announced the proposal to repeal Regulation C (Home Mortgage Disclosure), which has been superseded by CFPB rules.

The Federal Reserve Board press release is available at: http://www.federalreserve.gov/newsevents/press/bcreg/20160211a.htm.

The text of the final rule repealing Regulation AA is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160211a1.pdf.

The text of the proposed rule to repeal Regulation C is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160211a2.pdf.

### European Securities and Markets Authority Statement on Closet Indexing

On February 2, 2016, the European Securities and Markets Authority issued a statement, addressed to investors and fund managers, on some European collective investment funds that may potentially be "closet index tracking funds." Closet indexing can occur when fund managers claim to manage portfolios actively, but in reality, the fund stays close to its benchmark index. Such practices can mislead investors as they may not receive the service or risk/return profile that they expect, whilst possibly paying higher fees than those usually charged for passive management. ESMA carried out research using a sample of around 2,600 funds between 2012 and 2014 and found that 5% to 15% of Undertakings for the Collective Investment of Transferable Securities equity funds could potentially be closet indexers. ESMA recommends that UCITS management companies re evaluate whether they provide accurate information to investors on the performance objectives of relevant funds so that investors can make informed investment decisions. ESMA has stated that it will take an active role in coordinating further analysis at national level and will assess whether any further steps are necessary to ensure that market participants wholly comply with disclosure obligations.

ESMA's statement is available at: https://www.esma.europa.eu/sites/default/files/library/2016-165_public_statement_-_supervisory_work_on_potential_closet_index_tracking.pdf.

## Credit Ratings

### European Securities and Markets Authority Publishes 2015 Annual Report and Workplan for 2016

On February 5, 2016, ESMA published a report providing an overview of its 2015 supervisory work relating to CRAs and Trade Repositories and setting out its workplan for 2016. ESMA's focus for 2016 includes: (i) improving the quality of credit ratings; (ii) improving trade repository quality data and data access; (iii) improving CRA governance and strategy; (iv) devoting resources to its enforcement work where it is aware of facts that may be infringing regulatory requirements; and (v) enhancing international cooperation with third country supervisors.

The report is available at: https://www.esma.europa.eu/sites/default/files/library/2016-234_esma_2015_annual_report_on_supervision_and_2016_work_plan.pdf.

## Derivatives

### US Commodity Futures Trading Commission Issues No-Action Relief to Certain Intermediaries Located Outside of the United States

On February 12, 2016, the US Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight provided no-action relief clarifying that the exemption from registration in Rule 3.10(c)(3) for persons located outside the United States who act as Introducing Brokers, Commodity Trading Advisors or Commodity Pool Operators on behalf of persons located outside of the United States is available in connection with swaps that are not submitted for clearing if such swaps are not subject to a CFTC clearing requirement.

The full text of the CFTC no-action letter is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-08.pdf.

### US Commodity Futures Trading Commission and the European Commission for Financial Stability, Financial Services and Capital Markets Union Announces Common Approach Regarding Requirements for Central Clearing Counterparties

On February 10, 2016, the European Commissioner for Financial Stability, Financial Services and Capital Markets Union and the CFTC jointly announced the adoption of a common approach regarding requirements for transatlantic central clearing counterparties. The common approach is intended to resolve an impasse that had prevented recognition of US CCPs under EMIR. Under the common approach, the European Commission is expected to determine that CFTC regulation of central counterparties is equivalent to EU requirements, subject to certain conditions. The CFTC is also expected to propose a determination of comparability with respect to certain EU requirements in order to permit EU CCPs that are or seek to be registered as derivatives clearing organizations to comply with such EU requirements in lieu of US requirements. The CFTC staff also committed to streamlining the registration process for EU CCPs wishing to register with the CFTC. In statements, CFTC Chairman Timothy Massad and Commissioner Jonathan Hill applauded the adoption of the common approach as an important step toward stable and uniform regulation of the global derivatives market.

More information regarding the common approach for CCPs is available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/02/EUUS-Agreement-On-Regulation-Of-Central-Counterparties-FIAFR-021616.pdf.

The full text of the statement of CFTC Chairman Timothy Massad regarding the common approach is available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement021016.

The full text of the statement of Commissioner J. Christopher Giancarlo regarding the common approach is available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement021016.

### US Commodity Futures Trading Commission Signs Memorandum of Understanding with German Authorities

On January 27, 2016, the US Commodity Futures Trading Commission announced the signing of a Memorandum of Understanding with the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) and Deutsche Bundesbank (Bundesbank) regarding cooperation and the exchange of information in the supervision and oversight of clearing organizations that operate in the United States and in Germany.

The MOU signifies a willingness among the CFTC, the BaFin, and the Bundesbank to collaborate in order to fulfill their respective regulatory mandates with respect to cross-border clearing organizations in the United States and Germany. The MOU accompanies the CFTC's decision to grant Eurex Clearing AG registration as a derivatives clearing organization.

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

### European Securities and Markets Authority Opinions on Exemptions for Pension Schemes to Centrally Clear OTC Derivatives Contracts

On February 2, 2016, ESMA published a document comprising a set of Opinions on certain UK pension schemes that are to be exempt from centrally clearing OTC derivatives contracts under the European Market Infrastructure Regulation. The Opinions have been requested by the UK's FCA and relate to 16 different kinds of pension schemes. Transitional exemptions from the clearing obligation can be granted to pension scheme arrangements that meet certain criteria, essentially, when OTC derivatives contracts are entered into and are used for hedging purposes. To obtain an exemption, requests must be made by the pension scheme to a national regulator. Under EMIR, the national regulator must seek an Opinion from ESMA before making a final exemption decision. ESMA, in turn, must consult with the European Insurance and Occupational Pensions Authority before issuing its Opinion. The FCA has now granted exemptions and ESMA will publish the list of the types of entities that have been given exemptions in the near future. This follows on from the transitional exemption period for pension funds from the clearing obligation having been extended to August 16, 2017. Pension funds must comply with the EU clearing obligation by this date under EMIR.

ESMA's press release and set of Opinions are available at: https://www.esma.europa.eu/press-news/esma-news/esma-issues-opinions-uk-pension-schemes-be-exempt-central-clearing-under-emir.

### European Commission and US Commodity Futures Trading Commission Reach Agreement on Regulation of Clearing Houses and Central Counterparties

On February 10, 2016, the European Commission and US CFTC announced they had reached agreement on a common approach to requirements for central clearing counterparties. The Commission is expected to adopt an equivalence decision affirming that the CFTC requirements for US CCPs are equivalent to those under EMIR. US CCPs recognised under EMIR will be able to continue to provide services in the EU whilst complying with CFTC requirements, although this will likely be subject to US CCP compliance with certain aspects of EU rules on collateral calculations. ESMA has also announced that whilst it has 180 days to recognise CCPs under EMIR, it aims to shorten that period given the deadline of June 21, 2016, for the start of the clearing obligation. The CFTC will propose a determination of comparability with EU requirements, allowing EU CCPs to provide services to US clearing members and clients whilst complying with EU requirements. The registration process for EU CCPs wishing to register with the CFTC is also expected to be streamlined. A separate more detailed client note will be published in due course, treating these issues in more detail.

The statement of the Commission and CFTC is available at: http://ec.europa.eu/finance/financial-markets/docs/derivatives/20160210-eu-cftc-joint-statement_en.pdf.

ESMA's statement is available at: https://www.esma.europa.eu/sites/default/files/library/2016-278_eu-us_approach_ccp_equivalence.pdf.

### Committee on Payments and Markets Infrastructure and International Organization of Securities Commissions Statement on Clearing of Deliverable Foreign Exchange Instruments by CCPs

On February 5, 2016, the Bank for International Settlements, Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions released a joint statement on the clearing of deliverable foreign exchange instruments by central counterparties. The statement provides additional detail around the expectations of CPMI and IOSCO with respect to CCP clearing of deliverable FX instruments and the related models for their settlement originally set out in the April 2012 *Principles for financial market infrastructures*. The statement notes that while CCPs are not obligated to use a particular settlement process for deliverable FX instruments, the CCP is responsible for the process, including ensuring it complies with the Principles, and conducting appropriate due diligence. The statement notes that CCPs should ensure there are adequate highly reliable liquidity sources to cover liquidity shortfalls, and, at the same time, ensure confidence that same day settlement obligations will be completed despite any such shortfall or other default.

The statement is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD525.pdf.

## Enforcement

### UK Regulator Must Reconsider its Decision Refusing Authorization Based on "Unjustified Accusation"

On February 8, 2016, the Upper Tribunal published its decision directing the FCA to reconsider its refusal to approve a firm for regulated activities based on the fact that its sole director, Mr. Ladele, had been charged with fraud, notwithstanding his acquittal. Mr. Ladele simultaneously applied for approval to perform certain controlled functions. In 2010, Mr. Ladele had accessed confidential customer information during his employment at HSBC. This information was used by one or more persons for fraudulent transactions. Mr. Ladele was acquitted in 2012 of the criminal offence of fraud by abuse of position relating to the fraudulent transactions. In 2014, the firm applied to the FCA for approval to carry on a range of regulated activities, including advising on pensions, arranging regulated mortgage contracts and arranging deals in investments. The FCA refused approval in 2015 on the grounds that Mr. Ladele, on the balance of probabilities, had been involved in the previous fraudulent activities, despite his acquittal. As a result, the FCA did not consider that the firm for which Mr. Ladele was sole director would satisfy the threshold conditions, in particular the suitability condition requiring the firm to be a fit and proper person. The firm referred the FCA's decision to the Tribunal. The Tribunal found that the firm had been subject to an unjust accusation and directed the FCA to reconsider its decision.

The Tribunal's decision is available at: http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Abi-Fol-Consulting-Ltd-v-FCA.pdf.

### UK Regulator Fines Former Head of JPMorgan's CIO International

On February 9, 2016, the FCA issued JPMorgan's former head of CIO International, Mr. Achilles Macris, a Final Notice and a fine of £792,000 for failing to be open and co-operative. The FCA found that Mr. Macris was responsible for a number of portfolios, including the Synthetic Credit Portfolio, later known as the "London Whale" trades. The notice states that, between March and April 2012, Mr. Macris failed to inform the FCA's predecessor, the Financial Services Authority, about concerns related to the SCP even though Mr. Macris was also aware that the firm was subject to a "close and continuous" relationship with the FSA from October 2010, meaning that the firm had been recognized as requiring close monitoring and possibly carrying a high probability of risk. The SCP suffered increasing losses from January 2012, and the FCA found that Mr. Macris, despite having attended a meeting with the FSA in March 2012, failed to update the FSA on the full extent of those difficulties, including, according to the FCA, the SCP having by then

made a $200 million loss and having experienced rebalancing problems. The FCA also found that, in April 2012, Mr. Macris, having participated in another meeting with the FSA, failed again to inform the FSA of the continuing difficulties arising out of the SCP. By the end of April 2012, the SCP had recorded a year-to-date loss of over $2 billion. Mr. Macris was found to have failed to meet the standards expected of an Approved Person under the Statement of Principle 4 for Approved Persons. Mr. Macris was also identified in the FCA's Final Notice to JPMorgan Chase, dated September 19, 2013, in relation to the London Whale case. The Court of Appeal held that Mr. Macris had been prejudicially identified in the Final Notice. The UK Supreme Court has granted the FCA permission to appeal this decision and the case is due to be heard by the Supreme Court later this year.

The Final Notice is available at: http://www.fca.org.uk/static/fca/documents/final-notices/achilles-macris.pdf.

Our client note on the identification of third parties in FCA Notices is available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/01/Identification-of-Third-Parties-in-FCA-Notices-FIA-012615.pdf.

### UK Court Orders the Return of £2.9 Million to Defrauded Investors

On February 12, 2016, Southwark Crown Court ordered Mr. Alex Hope and Mr. Raj Von Badlo to return around £2.9 million to investors who were defrauded by a collective scheme that Mr. Hope established and operated without regulatory authorization to do so. The Court made a confiscation order against Mr. Hope, pursuant to the Proceeds of Crime Act 2002, for an amount of £166,696. Mr. Hope's co-defendant, Mr. Von Badlo, was also subject to a confiscation order made at a hearing on December 18, 2015, in which he was ordered to pay £99,819. The Orders follow a prosecution by the FCA. The scheme, which was closed down by the FCA in April 2012, had a significant impact on over 100 investors. Mr. Hope had represented himself as a talented and skillful trader, however, he only actually traded around 12% of the total money his investors had given him and spent the majority of his investors' funds on himself. Mr. Hope was found guilty of fraud for operating an investment scheme without authorization in September 2015. Mr. Badlo pleaded guilty in July last year to recklessly making false representations to investors and promoting a collective investment scheme without authorization. Both individuals were sentenced to seven and two years' imprisonment respectively in January 2015. Failure by Mr. Hope or Mr. Von Badlo to comply with the Court's orders could result in their current prison sentences being extended.

The FCA's press release is available at: http://www.fca.org.uk/news/2-9-million-to-be-returned-to-investors-following-fca-prosecution.

## Financial Market Infrastructure

### Chair of the US Board of Governors of the Federal Reserve System Presents Semiannual Monetary Policy Report to Congress

On February 10, 2016, Janet Yellen, the Chair of the Federal Reserve Board submitted before Congress the Federal Reserve Board's semiannual Monetary Policy Report. In her remarks, Chair Yellen discussed the current economic situation and outlook of the US economy since July 2015, including strong gains in the job market along with continued moderate expansion in economic activity. Chair Yellen further discussed monetary policy and emphasized that the Federal Open Market Committee continues to monitor the federal funds rate, but anticipates that economic conditions will warrant only gradual increases in the federal funds rate.

The full text of Chair Yellen's testimony is available at: http://www.federalreserve.gov/newsevents/testimony/yellen20160210a.htm.

### UK Regulator Final Rules on Fair, Reasonable and Non Discriminatory Access to Regulated Benchmarks

On February 8, 2016, the FCA published a Policy Statement on Fair, Reasonable and Non Discriminatory access to regulated benchmarks, setting out the feedback it received to its consultation last year. The Policy Statement includes

the FCA's final rules which affect the administrators of eight regulated benchmarks: the ICE London Inter Bank Offered Rate (ICE LIBOR), the Sterling Overnight Index Average (SONIA), the Repurchase Overnight Index Average (RONIA), the WM/Reuters London 4pm Closing Spot Rate, the ICE Swap Rate, the LBMA Gold Price, the LBMA Silver Price and the ICE Brent Index. The rules go beyond the general competition powers of the FCA and include specific requirements on benchmark administrators in relation to access. The FCA rules are changed from those in the initial consultation in being limited to users that are exchanges, clearing houses and multilateral trading facilities, consistent with EU regulations, in particular the Markets in Financial Instruments Regulation (which is due to apply from January 3, 2017). The FCA's final rules enter into force on April 1, 2016.

The Policy Statement is available at: http://www.fca.org.uk/static/fca/documents/policy-statements/ps16-04.pdf.

## Financial Services

### US-EU Financial Market Regulatory Dialogue Meeting

On February 12, 2016, the European Commission published a joint statement following a meeting that took place on February 3, 2016 between the participants of the US-EU Financial Market Regulatory Dialogue. The group met to discuss key regulatory topics including recent developments in bank capital and liquidity measures, bank resolution, cross-border bank supervision, CCP resolution, derivatives reforms and benchmarks reforms. Amongst other things, US and EU participants outlined the progress made on: (i) the common approach on requirements for central clearing counterparties and the equivalence of US trading platforms under the EU Markets in Financial Instruments framework; (ii) the proposed European Benchmark reform; and (iii) resolution frameworks for CCPs. The participants included representatives from the European Commission, European Central Bank, US Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and the Securities and Exchange Commission. The next meeting will be taking place in Brussels in July 2016.

The joint statement is available at: http://ec.europa.eu/finance/general-policy/docs/global/160212-us-eu-joint-statement_en.pdf.

### European Commission Request for Technical Advice on Proposed Benchmark Regulation

On February 11, 2016, the European Commission asked ESMA for technical advice on potential delegated acts due under the proposed European Benchmark Regulation. The proposed Benchmark Regulation aims to ensure that benchmarks produced and used in the EU are robust, reliable, fit for purpose and free from manipulation. The Commission's mandate requests technical advice from ESMA on matters including: (i) what constitutes administering arrangements for determining a benchmark, taking into account different existing business practices; (ii) what constitutes the issuance of a financial instrument for the purposes of defining the use of a benchmark; and (iii) the conditions under which a national regulator may decide that there is an objective reason for the provision of a benchmark or family of benchmarks in a third country. In response to the Commission's request, ESMA published a discussion paper on the Regulation and its technical implementation. The proposed Regulation is expected to enter into force in June 2016. ESMA has been asked to provide its technical advice four months after the Regulation's entry into force. Currently, the Benchmark Regulation and delegated acts are expected to apply 18 months after the Regulation enters into force.

The Commission's request for technical advice is available at: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf.

The Commission's covering letter to ESMA is available at: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-cover-note_en.pdf.

ESMA's discussion paper is available at: https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf.

### European Securities and Markets Authority Discussion Paper on Proposed Benchmark Regulation

On February 15, 2016, ESMA published a discussion paper on the proposed EU Benchmarks Regulation and its technical implementation. ESMA is seeking views on initial proposals it intends to make in the form of draft RTS and Technical Advice. This follows on from the European Commission's mandate sent to ESMA on February 11, 2016, requesting technical advice on potential delegated acts on the Benchmark Regulation. The areas on which ESMA is seeking views include: (i) the definition of benchmarks; (ii) what constitutes administering arrangements for determining a benchmark, taking into account different existing business practices; (iii) what constitutes the issuance of a financial instrument for the purposes of defining the use of a benchmark; (iv) the measurement for the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds for a benchmark within a combination of benchmarks relating to the assessment of benchmarks; and (v) transparency requirements for benchmark methodology. The exact entry into force of the Benchmark Regulation is still unknown, though it is expected to enter into force in June 2016. ESMA has been asked to provide its technical advice four months after the Regulation enters into force. Currently, the Regulation and delegated acts are expected to apply 18 months after the Regulation enters into force. ESMA aims to analyze the responses to the discussion paper before July 2016 and to publish a consultation paper later this year. Comments on the discussion paper are due by March 31, 2016.

The discussion paper is available at: https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf.

### UK Regulator's Internal Audit Reports Scrutinized

On February 8, 2016, the Treasury Select Committee published three of the FCA's internal audit reports dated October 2014. The Treasury Committee, on behalf of Parliament, has committed to scrutinize the FCA more rigorously since the financial crisis. In 2014, the Committee decided that its scrutiny would also extend to reviewing the FCA's internal audit reports, to ensure that the audit reports are of a reasonable standard. The Treasury Committee published the FCA's audit reports from the first half of 2014 in October 2015. The latest audit reports are on: (i) the identification, handling and management of market sensitive information; (ii) the FCA's incident response and crisis management capability; and (iii) the design and effectiveness of the FCA's external communications strategy. Whilst the Treasury Committee is of the view that the FCA's processes are improving overall, it believes that there is still work to be done.

The Treasury's February 2016 press release is available at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2015/fca-internal-audit-reports-15-16/.

The Treasury's October 2015 press release is available at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2015/fca-internal-audit-reports/.

### UK Regulators Consult on Regulators' Complaints Handling and Procedures

On February 11, 2016, the Bank of England, PRA and FCA jointly published a consultation paper on how complaints about them are reported and responded to. The regulators operate a Complaints Scheme that investigates complaints against them. The scheme has recently been revised. The revisions require the Complaints Commissioner, which is the investigator of complaints against the regulators, to produce an annual report on such investigations and send a copy of the report to the regulators as well as the Treasury. If the Complaints Commissioner makes recommendations or criticisms about the handling of a complaint against a regulator, the regulator must respond to such recommendations or criticisms and send its response to both the Complaints Commissioner and Treasury. The Regulators are seeking views on the proposed revisions to the Complaints Scheme, following the legislative amendments. The regulators are also

obliged to review the operation of the scheme after three years, which may lead to a further consultation in 2016. Responses to the consultation are due by March 8, 2016.

The consultation paper is available at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp516.pdf.

## Funds

### UK Regulator Final Rules on Implementing the Undertakings for Collective Investment in Transferable Securities Directive V

On February 2, 2016, the FCA published a Policy Statement and final rules on the Implementation of the UCITS V Directive. The Policy Statement sets out final rules, guidance and changes made to the FCA Handbook that affect managers and depositaries of UCITS and Alternative Investment Funds. The Policy Statement also sets out comments on the feedback received to the FCA's Part I consultation on the implementation of UCITS V published in September 2015, including: (i) remuneration principles and requirements applicable to managers, including details on payments of proportions of variable remuneration in non cash instruments; (ii) the applicable transparency obligations towards investors; and (iii) changes for depositaries including eligibility criteria and capital requirements for firms acting as depositaries of UCITS. The rules and guidance enter into force on March 18, 2016, the date on which the FCA is required to implement the UCITS V Directive. Certain requirements however are subject to transitional provisions. For example, UCITS managers will only have to comply with some of the remuneration requirements after the start of the first full performance period, post March 18, 2016. Also, non bank depositaries appointed before March 18, 2016 may continue to provide depositary services to UCITS clients until March 18, 2018, even if they have not yet met all new operational and prudential requirements applicable to them.

The Policy Statement is available at: http://www.fca.org.uk/static/documents/policy-statements/ps16-02.pdf.

The Consultation Paper is available at: http://finreg.shearman.com/uk-regulator-consults-on-implementation-of-recent.

## MiFID II

### European Securities and Markets Authority Guidelines for Complex Debt Instruments and Structured Deposits

On February 4, 2016, ESMA published translations of its Guidelines for complex debt instruments and structured deposits under the Markets in Financial Instruments Directive II. MiFID II allows investment firms, under certain circumstances only, to provide clients with investment services that consist of execution, reception and transmission of orders only (known as execution only orders), without the investment firm having to obtain any relevant client information to assess whether the service or product provided is appropriate for a particular client. Such products must be non complex. ESMA's Guidelines identify those complex products for which execution only services may not be provided, setting out a non exhaustive list of examples of such products. National regulators have two months to notify ESMA whether or not they comply with the Guidelines. The Guidelines will apply from January 3, 2017.

The Guidelines are available at: https://www.esma.europa.eu/sites/default/files/library/2015-1787_-_guidelines_on_complex_debt_instruments_and_structured_deposits.pdf.

### European Commission Proposes One-Year Extension for Application of MiFID II

On February 10, 2016, the European Commission proposed a one-year extension to the effective date of the Markets in Financial Instruments Directive and Markets in Financial Instruments Regulation, collectively known as MiFID II. The proposal, if approved, would mean that national regulators would have an additional year to comply with MiFID II. The new effective date would be January 3, 2018 instead of January 3, 2017. This extension is considered to be necessary due to the technical implementation challenges that national regulators and market participants are facing, particularly around transaction reporting and related data collection systems. The Commission was previously informed by the

European Securities and Markets Authority that national regulators and market participants would not have the necessary systems operational by the original application date, and that an extension would therefore be necessary so as to avoid potential market disruption and legal uncertainty. The extension will not affect the adoption of the technical standards which will continue to proceed through regulatory processes. The Commission has also proposed delaying the application of certain provisions of the Market Abuse Regulation and the Central Securities Depositories Regulation. Both regulations refer to definitions and concepts in MiFID II. These proposed extensions are subject to approval by the European Parliament and the European Council and no deadline has been set for such approval.

The Commission's press release is available at: http://europa.eu/rapid/press-release_IP-16-265_en.htm.

The Commission's proposals are available at: http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-57-EN-F1-1.PDF.

Our client note on the Commission's proposals is available at: http://www.shearman.com/en/newsinsights/publications/2016/02/delay-implementation-of-mifid-ii.

## Payment Services

### US Board of Governors of the Federal Reserve System Progress Report on Strategies for Improving the US Payment System

On February 2, 2016, the Federal Reserve Board released a report providing an update on its progress in implementing efforts to improve the US Payments System as set out in its 2015 *Strategies for Improving the US Payments System*. The report also outlines additional steps the Federal Reserve anticipates taking going forward. Two task forces comprised of more than 500 industry participants have been formed and they have created a list of 36 criteria that describe the attributes of an enhanced payment system. Work has been done with respect to standards, directories and business to business improvements to enhance payment system efficiency. The report also notes that joint efforts with industry participants recently culminated in a plan to implement the financial messaging standard ISO 20022 for US wire transfer systems and advanced plans to implement widespread same day Automated Clearing House settlement.

The report is available at: http://fedpaymentsimprovement.org/wp-content/uploads/0216-progress-report.pdf.

### UK Regulator Call for Input on Existing Issues in Current Payment Services Regime

On February 10, 2016, the FCA issued a Call for Input on its approach to the current payment services regime further to the revised Payment Services Directive (known as PSD2) which is to be transposed into national law by January 2018. PSD2 will affect the way payments services providers (such as banks, building societies and money transmission firms) are regulated. The FCA expects to revise certain sections of its Handbook in light of the revised directive and is seeking views on whether any issues exist that should be addressed when the updates are made. Responses to the Call for Input are due by March 23, 2016.

The Call for Input is available at: http://www.fca.org.uk/static/fca/documents/call-for-input-payment-services-regime.pdf.

## Recovery & Resolution

### European Banking Authority Disagrees with European Commission on Criteria for MREL

On February 9, 2016, the EBA published its Opinion expressing its disagreement with certain of the European Commission's proposed amendments to the final draft Regulatory Technical Standards on the criteria for setting the Minimum Requirement for Own Funds and Eligible Liabilities (MREL). MREL is the European equivalent of US TLAC. The EBA submitted the draft RTS to the Commission in July 2015. The Commission proposed a number of amendments in December 2015. The EBA disagrees on, amongst other things: (i) the removal of the reference to a

minimum contribution to loss absorption and recapitalization of 8% of total liabilities and own funds; (ii) the removal of the test for downward adjustments to the recapitalization amount and peer group reference for systemic institutions; and (iii) the removal of the upper limit (48 months) on the transitional compliance period, instead making reference to a transitional period that is "as short as possible." The EBA has resubmitted a further revision of the draft RTS to the Commission as an Annex to the Opinion.

The Opinion is available at: http://www.eba.europa.eu/documents/10180/1359456/EBA-Op-2016-02+Opinion+on+RTS+on+MREL.pdf.

## Securities

### European Securities and Markets Authority Technical Standards on Settlement Discipline

On February 1, 2016, ESMA published a final report setting out draft RTS on settlement discipline as required under the Central Securities Depository Regulation. The RTS cover measures for preventing settlement fails through automated matching, a hold and release mechanism and partial settlement. The RTS also provide measures for monitoring and addressing settlement fails such as a mechanism for cash penalties and a buy in process. ESMA has submitted the final draft RTS to the European Commission for endorsement.

The Final Report and RTS are available at: https://www.esma.europa.eu/press-news/esma-news/esma-issues-technical-standards-settlement-discipline-under-csdr.

## People

Louise L. Roseman, director of the Division of Reserve Bank Operations and Payment Systems of the Federal Reserve Board, will retire later this year after more than 30 years of service to the Federal Reserve Board, including 17 years as director. A search for Ms. Roseman's successor is underway.

## Upcoming Events

February 19, 2016: EBA Public Hearing on Draft Technical Standards under the Interchange Fee Regulation (registration closed).

February 24, 2016: BoE Conference Call on Proposed Approach to Setting the Minimum Requirement for Own Funds and Eligible Liabilities (registration closes: February 17, 2016).

February 29, 2016: ESMA Open Hearing on the Benchmark Regulation Discussion Paper.

February 29, 2016: ESMA Hearing on Market Abuse Regulation Guidelines.

March 2, 2016: European Commission Public Hearing on Green Paper on Retail Financial Services.

March 22, 2016: PRA and FCA Seminar on New Bank Start Up Unit (registration closes: February 22, 2016).

## Upcoming Consultation Deadlines

February 19, 2016: Federal Reserve Board Proposed Rule on TLAC.

February 19, 2016: ESMA Discussion Paper on Validation and Review of Credit Rating Agencies Methodologies.

February 20, 2016: FCA Consultation on Amending Guidance on Delaying Disclosure of Inside Information.

February 22, 2016: CFTC Draft Technical Specifications for Certain Swap Data.

February 23, 2016: CPMI and IOSCO Consultation on Cyber Resilience.

February 25, 2016: UK Government Proposed Changes for Implementation of Bank Recovery and Resolution Directive.

March 4, 2016: European Supervisory Authorities Discussion Paper on Automation in Financial Advice.

March 8, 2016: EBA Consultation on draft RTS on Separation of Payment Card Schemes and Processing Entities under the Interchange Fee Regulation.

March 8, 2016: EBA Consultation on Draft Implementing Technical Standards Amending Regulation on Supervisory Reporting of Institutions and Financial Reporting.

March 8, 2016: BoE, PRA and FCA Consultation on Regulators' Complaints Handling and Procedures.

March 8, 2016: FCA First Consultation on the Implementation of MiFID II.

March 11, 2016: EBA Consultation on Guidelines on the Collection of Information for the Internal Capital Adequacy Assessment Process and Internal Liquidity Adequacy Assessment Process.

March 11, 2016: EBA Consultation on Draft RTS on Information Sharing Between National Regulators under Revised Payment Services Directive.

March 11, 2016: BoE Consultation on its Approach to Setting MREL.

March 11, 2016: PRA Consultation on MREL – Buffers and Threshold Conditions.

March 11, 2016: PRA Consultation on Ensuring Operational Continuity in Resolution.

March 11, 2016: Basel Committee Consultation on Revised Standardized Approach to Credit Risk.

March 13, 2016: EBA Consultation on Draft RTS on Assessment Methodology for Use of Internal Models for Market Risk.

March 17, 2016: Basel Committee Consultation on Addressing Step in Risk.

March 18, 2016: EBA Consults on Proposed Guidelines on Stress Testing.

March 21, 2016: Federal Reserve Board Framework for Implementing the Basel III Countercyclical Capital Buffer.

March 25, 2016: European Commission Consults on Long Term and Sustainable Investment.

March 31, 2016: ESMA Consultation on Proposed Guidelines under MAR.

March 31, 2016: New York State Department of Financial Services Proposed Transaction Monitoring and Filtering Program.

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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