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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.

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

Bank Prudential Regulation & Regulatory Capital

US Board of Governors of the Federal Reserve System Releases Guidance that Consolidates Capital Planning Expectations for Large Financial Institutions

On December 21, 2015, the US Board of Governors of the Federal Reserve System issued guidance for the benefit of its examiners, as well as banking institutions, intended to consolidate its capital planning expectations for all large financial institutions and identify differences in its expectations, depending on the size and complexity of such institutions. For institutions that are bank holding companies and intermediate holding companies of foreign banks subject to the Federal Reserve Board's Large Institution Supervision Coordinating Committee framework, and firms with $250 billion or more in total consolidated assets or $10 billion or more in foreign exposures, the guidance explains expectations previously communicated to such institutions through prior Comprehensive Capital Analysis and Review exercises and related supervisory reviews. The guidance also clarifies capital planning processes for firms with more than $50 billion, but less than $250 billion in total consolidated assets, as well as less than $10 billion in foreign exposures, taking into account such firms' lower systemic risk profiles and less complex operations. Additionally, the guidance notes that bank holding companies with more than $50 billion in total consolidated assets are subject to the Federal Reserve Board's CCAR, which evaluates the firms' planned capital actions, such as dividend payments and share buybacks and issuances. The guidance is effective for the 2016 CCAR cycle.

The Federal Reserve Supervisory Assessment of Capital Planning and Positions for LISCC Firms and Large and Complex Firms is available at: http://www.federalreserve.gov/bankinforeg/srletters/sr1518.htm.

The Federal Reserve Supervisory Assessment of Capital Planning and Positions for Large and Noncomplex Firms is available at: http://www.federalreserve.gov/bankinforeg/srletters/sr1519.htm.

US Federal Reserve Board Seeks Public Comment on Proposed Policy Statement Regarding the Countercyclical Capital Buffer

On December 21, 2015, the Federal Reserve Board announced it is soliciting public comment on a proposed policy statement describing its framework for setting the Countercyclical Capital Buffer, a macroprudential tool that raises capital requirements on internationally active banking institutions when the risk of above-normal losses in the future is elevated. The CCyB, which applies to banking organizations that are subject to the advanced approaches capital rules (generally those with more than $250 billion in assets or $10 billion in on-balance-sheet foreign exposures) and to their depository institution subsidiaries, would aid such institutions in absorbing shocks in connection with declining credit conditions and help moderate fluctuations in the supply of credit. The proposed policy statement describes various financial-system vulnerabilities as well as issues for Federal Reserve Board consideration in setting the buffer, including leverage in the nonfinancial sector, leverage in the financial sector, maturity and liquidity transformation in the financial sector and asset valuation pressures. Calculations of the CCyB are based on private-sector credit exposures located in the US and, once fully phased in, the CCyB could range from 0 percent of risk-weighted assets to a maximum of 2.5 percent. Banks subject to the CCyB would face restrictions on capital distributions and the payment of discretionary bonuses if they fail to meet the buffer. The Federal Reserve Board, in consultation with the US Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, has voted to affirm the CCyB amount at the current level of 0 percent. The deadline for comment on the proposed policy statement is February 19, 2016.

The proposed policy statement is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20151221b1.pdf and the appendix to the statement is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20151221b2.pdf.

US Federal Banking Agencies Issue Statement on Prudent Risk Management for Commercial Real Estate Lending

On December 18, 2015, the US Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency jointly issued a statement calling for sensible risk-management practices regarding commercial real estate lending in light of the substantial growth in many commercial real estate asset and lending markets. The federal banking agencies urged financial institutions to maintain underwriting discipline and practice prudent risk-management in order to identify, measure, monitor, and manage the risks arising from commercial real estate lending. The agencies also noted that some of the risks associated with commercial real estate lending that they have observed include increased competitive pressures, rising commercial real estate concentrations in banks, and an easing of commercial real estate underwriting standards. The statement reinforces existing guidance for commercial real estate risk management in particular, the guidance on concentrations issued in December 2006.

The statement is available at: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20151218a1.pdf and the 2006 Concentration Guidance is available at: https://www.gpo.gov/fdsys/pkg/FR-2006-12-12/pdf/06-9630.pdf.

US Office of the Comptroller of the Currency Report Highlights Top Risks Facing National Banks and Federal Savings Associations

On December 16, 2015, the OCC issued its *Semiannual Risk Perspective for Fall 2015* which highlights risks facing national banks and federal savings associations, based on data through June 30, 2015. According to the report, strategic, underwriting, cyber security, compliance and interest rate risks are the top supervisory concerns of the OCC. Generally, the OCC reports that risks related to underwriting and cyber security are increasing, while strategic, compliance, and interest rate risk remain constant. Specifically, the report notes that due to a low interest rate environment, many federal banks have faced obstacles to revenue growth. The report also notes that banks have been responding to the competitive environment by easing their credit underwriting standards. In addition, cyber security threats and resiliency planning have been of the utmost concern for the industry and will remain a key topic of focus going forward.

The OCC's *Semiannual Risk Perspective for Fall 2015* is available at: http://www.occ.gov/publications/publications-by-type/other-publications-reports/semiannual-risk-perspective/semiannual-risk-perspective-fall-2015.pdf.

US Federal Reserve Board Issues Supervisory Letter Related to Enhancements to its Surveillance Program

On December 10, 2015, the US Federal Reserve Board issued an SR Letter regarding enhancements to its safety-and-soundness surveillance program for state member banks and top-tier bank and saving and loan holding companies. The Federal Reserve Board noted that it has focused on making its supervision framework more forward-looking and data-driven. In light of these goals, two key improvements to the program noted in the supervisory letter include: (i) new risk classification algorithms intended to provide examiners with early signs of an institution's risk tendencies; and (ii) an early-warning model for holding companies that pairs with the existing early-warning model for financial deficiencies at state member banks. The Federal Reserve Board also issued guidance regarding specific metrics, procedures, and write-up requirements used to monitor state member banks and holding companies.

Supervision and Regulation Letter 15-16 Letter is available at: http://www.federalreserve.gov/bankinforeg/srletters/sr1516.pdf and the attachment to the letter is available at: http://www.federalreserve.gov/bankinforeg/srletters/sr1516a1.pdf.

EU Guidelines on Limiting Exposures to Shadow Banking Entities Published

On December 15, 2015, the European Banking Authority published final Guidelines on requirements for banks and certain investment firms to have sufficient information about, and to set limits on, their individual and aggregate exposure to shadow banking entities which carry out certain banking-like activities, such as lending, outside a regulated framework. The EBA is mandated to produce the Guidelines under the Capital Requirements Regulation which limits the exposure a firm can have to a single client or group of connected clients (more generally known as limits to large

exposures). In order to prepare the Guidelines, the EBA collected data from 148 EU firms on their exposures to shadow banking entities, the results of which are published in a separate report. Both the Report and the Guidelines will help inform the European Commission's report on the appropriateness and impact of imposing such limits, which may be accompanied by a legislative proposal. The EBA Guidelines will apply from January 1, 2017.

The Guidelines are available at: http://www.eba.europa.eu/documents/10180/1310259/EBA-GL-2015-20+GL+on+Limits+to+Exposures+to+Shadow+Banking+Entities.pdf and the EBA's report is available at: http://www.eba.europa.eu/documents/10180/950548/Report+on+institutions+exposures+to+shadow+banking+entities.pdf.

European Banking Authority Reports on Synthetic Securitization in Europe

On December 18, 2015, the EBA published a report on its analysis and market practice assessment of synthetic securitization in Europe. The report makes recommendations for the European Commission's proposed legislative amendments to the CRR and proposed securitization regulation, which provide for the preferential regulatory treatment of simple, transparent and standardized securitizations. The EBA's analysis supports the approach taken by the Commission in its proposed securitization framework, which provides for a different regulatory treatment of on-balance sheet synthetic securitization positions retained by originator banks. The EBA concurs that the proposed framework should not be extended to all synthetic securitizations applicable to all investors across asset types. The EBA recommends that certain criteria be met for eligibility of balance sheet synthetic transactions, including requirements that originator banks should meet to transfer the risk of eligible transactions to public or private investors. In particular, the EBA advises the Commission to consider amending its proposal to include transactions in which private investors provide credit protection in the form of cash. The report follows the EBA's report in July 2015 on a qualifying framework for traditional securitization.

The report is available at: http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-26+EBA+report+on+synthetic+securitisation.pdf.

The Commission's proposed securitization framework is available at: http://finreg.shearman.com/european-commission-publishes-proposed-legislativ.

European Banking Authority Recommends Net Stable Funding Requirement for EU Banks

On December 17, 2015, the EBA published a report, dated December 15, 2015, on the necessity for adding stable funding requirements to the EU regulatory capital requirements framework. The CRR requires the EBA to report to the Commission on whether and how it would be appropriate to ensure that banks and investment firms use stable sources of funding and to provide an assessment of the impact of a stable funding requirement on the businesses and risk profiles of firms in the EU, the financial markets, the economy and trade financing, as well as potential methodologies for determining the amount of stable funding available to and required by firms. The mandate was included in the CRR in response to the Basel Committee on Banking Supervision's publication in 2010 of a net stable funding ratio (known as the NSFR) to be put in place by 2018. The NSFR requires firms to maintain a stable funding profile in relation to their assets and off-balance-sheet activities over a period of one year. The EBA considers that a net stable funding requirement should be implemented for banks in the EU and recommends that: (i) the net stable funding requirement should be applied on both a consolidated and solo basis, allowing for waivers and intragroup preferential treatment of banks that are part of a group; (ii) the Basel Committee's calibration and definition for the NSFR generally work for the EU; (iii) the upcoming Basel Committee review on derivatives margining should be taken into account when the framework is developed; (iv) a minimum amount of available stable funding should be imposed; (v) the calibration of a net stable funding requirement for trade finance-related transactions needs to differentiate between off-balance-sheet commitments and on-balance-sheet exposures; (vi) the Basel standard on the treatment of interdependent assets and liabilities is suitable for fully matched funded amortized mortgage lending; (vii) central counterparties should be exempt

from the net stable funding requirement; (viii) the Basel approach to centralized regulated savings as interdependent assets and liabilities should be adopted; (ix) residential loans guaranteed by banks or insurers should have an equal treatment; (x) smaller banks should be subject to the same requirements; and (xi) the net stable funding requirement should be equal to at least 100% on an ongoing basis.

The report is available at: http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-22+NSFR+Report.pdf.

European Commission Proposes Extension of Exemptions for Commodity Dealers

On December 16, 2015, the European Commission published a proposed Regulation which would amend the CRR with regards to exemptions for commodity dealers. The CRR currently exempts commodity dealers from large exposures requirements and own fund requirements until December 31, 2017. That date was set on the basis that the Commission would have conducted a review of the prudential regime applicable to commodity dealers and to investment firms by the end of 2015 and, if appropriate, proposed a legislative regime adapted for the risks profile of commodity dealers and investment firms. The Commissions' review is still in progress. The Commission is therefore proposing that the CRR exemptions are extended until December 31, 2020 to allow time for work in this area to be completed and to avoid the need for relevant firms to temporarily comply with the full CRR requirements in 2018 before being subsequently moved to a tailored regime within two to three years.

The proposed Regulation is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-648-EN-F1-1.PDF.

EU Regulation on Currencies with Constraints on Availability of Liquid Assets Published

On December 16, 2015, the Regulation setting out Implementing Technical Standards for currencies with constraints on the availability of liquid assets under the CRR was published in the Official Journal of the European Union. The CRR sets out a Liquidity Coverage Requirement which requires firms to hold liquid assets to maintain adequate levels of liquidity buffers to face any possible imbalances between liquidity inflows and outflows. The CRR allows firms to apply derogations where justified needs for liquid assets exist owing to the Liquidity Coverage Requirement, which exceed the availability of those liquid assets in certain currencies. The Regulation identifies the Norwegian Krone as a currency with constraints on the availability of liquid assets. The Regulation enters into force on January 5, 2016.

The Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.330.01.0026.01.ENG&toc=OJ:L:2015:330:TOC.

European Banking Authority Opinion and Report on Cooperation and Information Sharing between Regulators

On December 10, 2015, the EBA published an Opinion and Report on cooperation and information sharing between EU and non-EU national regulators, as required under the Capital Requirements Directive. The EBA identifies areas of improvement and proposes legislative changes to encourage better prudential supervision of international banks and investment firms. The Opinion states that there is a need for more clarity in the equivalence assessment processes of non-EU supervisory and regulatory regimes, confidentiality regimes within and outside supervisory colleges as well as in the supervision of institutions on a consolidated basis. The EBA states that the establishment of clear instructions on equivalence assessments in the CRD and CRR would facilitate coordinated and consistent equivalent assessments. The EBA also proposes, amongst other things, to align the CRD with the Bank Recovery and Resolution Directive so that specific references to the status of "observers" are provided for non-EU national regulators that participate in supervisory colleges.

The Report and Opinion is available at: http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-19+%28Opinion+on+cooperation+with+third+countries+-+Art+161+%287%29%20CRD%29.pdf.

European Banking Authority Consults on Draft Standards on Assessment Methodology for Use of Internal Models

On December 14, 2015, the EBA launched a consultation on proposed draft Regulatory Technical Standards under the CRR on the assessment methodology national regulators should use when a firm applies for approval to calculate their own funds requirements using their internal models for one or more risk categories. In particular, the proposed draft RTS cover: (i) the methodology for national regulators to assess whether a firm complies with the requirements to use an Internal Model Approach for market risk; and (ii) the conditions under which national regulators assess the significance of the positions that will be included in the scope of an IMA. The proposed draft RTS are consistent with the RTS on the conditions for assessing materiality of extensions and changes to use market internal models, adopted by the European Commission in June 2015. Comments are due by March 13, 2016.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/1309020/EBA-CP-2015-27+CP+on+RTS+on+Assessment+methodology.pdf.

European Banking Authority Consults on Proposed Guidelines on Stress Testing

On December 18, 2015, the European Banking Authority launched a consultation on proposed Guidelines on stress testing and supervisory stress testing. The proposed Guidelines cover: (i) internal stress testing by firms, providing detailed guidance for firms when designing and conducting a stress testing program; (ii) the assessment of firms' stress testing by national regulators with the aim of ensuring convergence in the context of the supervisory review and evaluation process; and (iii) supervisory stress testing. The proposed Guidelines provide common organizational requirements, methodologies and processes for firms performing internal stress tests as part of their risk management processes and common methodologies for national regulators when conducting supervisory stress tests but do not set methodologies for the EBA's stress testing in cooperation with national regulators. Once finalized, the Guidelines will replace the current guidelines issued by the Committee of European Banking Supervisors. The consultation is open until March 18, 2016. The EBA aims to publish the final Guidelines in Q2 2016 and expects that they will apply from Q4 2016.

The proposed Guidelines are available at: http://www.eba.europa.eu/documents/10180/1314203/EBA-CP-2015-28+%28%20CP+on+the+GL+on+stress+testing+and+supervisory+stress+testing%29.pdf.

European Banking Authority Opines on Maximum Distributable Amount Under EU Regulation Capital Framework

On December 18, 2015, the EBA published an opinion, dated December 16, 2015, addressed to national regulators and the European Commission on the interaction of Pillar 1, Pillar 2 and combined buffer requirements and restrictions on distributions. The EBA considers that national regulators should ensure that the Common Equity Tier 1 capital that is used for calculation of the maximum distributable amount is limited to the amount not used to meet a firm's Pillar 1 and 2 own funds requirements. Also, national regulators should require firms to disclose MDA-relevant capital requirements. The EBA is also of the view that the Commission should review the MDA provisions of the Capital Requirements Directive, aiming to eliminate inconsistencies in the application of the provisions across the EU and should review the prohibition on distribution, in particular, as it relates to Additional Tier 1 instruments when no profits are made in a given year.

The Opinion is available at: http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-24+Opinion+on+MDA.pdf.

Basel Committee on Banking Supervision Publishes Third Progress Report on the Compliance by G-SIBs with Principles for Effective Risk Data Aggregation and Risk Reporting

On December 16, 2015, the Basel Committee published its third progress report on the adoption by banks of its Principles for effective risk data aggregation and risk reporting. The Principles must be implemented by global systemically important banks by January 1, 2016, and aim to strengthen risk data aggregation and risk reporting at banks

so that risk management and decision-making practices are improved. The report details the progress that G-SIBs have made in order to comply with the Principles. The Basel Committee recommends that: (i) banks and national regulators should continue to promote understanding of the Principles; (ii) national regulators should conduct more in-depth/specialized examinations on data aggregation requirements to evaluate weaknesses; (iii) banks should clearly articulate risk data aggregation and risk reporting expectations, in line with their risk appetite in both normal and stress periods; (iv) banks should have appropriate governance arrangements in place to oversee manual processes; (v) banks should consider reducing the complexity of their systems to meet the data aggregation requirements; (vi) auditors should undertake an independent assessment of each bank's compliance with the Principles in early 2016, reporting any necessary remedial action to the bank's board; and (vii) banks that are unable to comply by the deadline should agree plans to do so with their national regulator. The Basel Committee also recommends that national regulators apply the Principles to domestic systemically important banks (known as D-SIBs) from three years after they have been identified as such.

The report is available at: http://www.bis.org/bcbs/publ/d348.pdf.

Compensation

European Banking Authority Publishes Final Guidelines on Sound Remuneration and Recommends Legislative Changes

On December 21, 2015, the European Banking Authority published final Guidelines on sound remuneration policies and an Opinion on the application of proportionality to the remuneration provisions in the Capital Requirements Directive. The final Guidelines are applicable to banks and investment firms and cover all staff with particular aspects focusing on staff whose professional activities have a material impact on a firm's risk profile. The Guidelines will apply from January 1, 2017, a year later than originally intended. Therefore, firms do not need to amend their existing compensation practices for the 2016 performance year. The Guidelines set out detailed requirements for remuneration policies, the related governance arrangements and processes for implementing remuneration policies, updating the guidelines on remuneration policies published by the Committee of European Banking Supervisors to take into account changes introduced by the revised CRD IV, technical standards on the identification of staff and on the instruments which can be used for variable remuneration, the EBA's opinion on the use of allowances and industry developments.

The EBA's Opinion, addressed to the European Commission, European Parliament and Council, includes a proposed draft legislative proposal which would amend some of the remuneration requirements included in CRD IV. The EBA considers that legislative changes are required to ensure a harmonized approach to the application of the remuneration rules across the EU, in particular, the scope of exemptions. The proposed legislative changes include: (i) excluding certain small, non-complex firms from the application of the principles related to the deferral and the pay out in instruments of part of the variable remuneration; (ii) limiting the scope of the deferral requirements so that staff who receive low amounts of variable remuneration are excluded; and (iii) allowing listed firms to use share-linked instruments as elements of variable remuneration.

The final Guidelines are available at: http://www.eba.europa.eu/documents/10180/1314839/EBA-GL-2015-22+Guidelines+on+Sound+Remuneration+Policies.pdf and

The Opinion is available at: http://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-25+Opinion+on+the+Application+of+Proportionality.pdf.

Consumer Protection

US Consumer Financial Protection Bureau Issues Final Rules Regarding Annual Threshold Adjustments under Regulations Implementing the Home Mortgage Disclosure Act and the Truth in Lending Act

On December 18, 2015, the US Consumer Financial Protection Bureau issued two final rules related to annual threshold adjustments under the implementing regulations for the Home Mortgage Disclosure Act and the Truth in Lending Act. Under the HMDA and its implementing Regulation C, most mortgage lenders in metropolitan areas are required to collect, report and disclose data about mortgage loan applications, originations and purchases. Under the HMDA final rule, the asset-size exemption for banks, saving associations and credit unions under Regulation C will remain at $44 million, meaning that institutions with assets totaling this amount or less as of December 31, 2015, are exempt from collecting HMDA data in 2016.

Regulation Z, which implements TILA, provides for an asset-size threshold for certain creditors to qualify for an exemption from the requirement to establish an escrow account for a higher-priced mortgage loan. In 2013, the CFPB established the threshold at $2 billion, which adjusts automatically each year based on the annual percentage change in the average of Consumer Price Index for Urban Wage Earners and Clerical Workers for each 12-month period ending in November. Under the TILA final rule, the asset-size threshold exemption for certain creditors will decrease from $2.060 billion to $2.052 billion for 2016. The adjustment will also lower the threshold for small-creditor and balloon payment qualified mortgages.

Both the HMDA and TILA final rules will be effective January 1, 2016.

The CFPB press release is available at: http://www.consumerfinance.gov/newsroom/cfpb-announces-two-annual-threshold-adjustments/.

The final rule implementing HDMA is available at:

http://files.consumerfinance.gov/f/201512_cfpb_hmda_regulation-c-adjustment-to-asset-size-exemption-threshold.pdf and the final rule implementing the TILA is available at: http://files.consumerfinance.gov/f/201512_cfpb_hmda_truth-in-lending-act-regulation-z-adjustment-to-asset-size-exemption.pdf.

Statement on Crowdfunding Risks by the International Organization for Securities Commissions

On December 21, 2015, the International Organization for Securities Commissions published a statement on addressing the regulation of crowdfunding and a report on its survey conducted on how crowdfunding is regulated in twenty-three IOSCO jurisdictions. The objectives of the statement and the report are to highlight emerging trends and issues in crowdfunding and to enhance IOSCO's understanding of how jurisdictions have adopted regulations on crowdfunding. Crowdfunding provides an alternative capital raising avenue, particularly for small enterprises and start-ups, which is beneficial in supporting economic growth but which may pose risks for investor protection. IOSCO's survey found that most jurisdictions had implemented regulations to address issues on conflicts of interest, data protection and fraud. IOSCO believes that more attention is required on the risk of default or failure of start-ups, potential failure of crowdfunding platforms, illiquidity, money laundering, fraud and terrorist financing as well as the suitability of any particular platform for an investor. IOSCO urges policy makers and regulators to consider the steps taken in some jurisdictions to address the risks of crowdfunding, including the imposition of registration requirements for funding portals, setting disclosure requirements for issuers and funding portals and requiring the appointment of a third party custodian to hold investor assets. In addition, the cross-border risks involved in crowdfunding should either be addressed by restricting cross-border fundraising or implementing a coordinated approach between relevant jurisdictions.

IOSCO's statement is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD521.pdf and the survey report is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD520.pdf.

Corporate Governance

Senior Managers Rules for UK Branches Finalized

On December 16, 2015, the Prudential Regulation Authority and the Financial Conduct Authority published their Policy Statements and final rules on the application of the UK Senior Managers and Certification regimes and new Conduct Rules to UK branches of EEA and non-EEA banks and PRA-designated investment firms. The PRA also published a related updated Supervisory Statement. Both of the regulators published near-final rules in August this year, pending legislation being adopted by Parliament which would formally extend the SM&CR to UK branches of such firms. That legislation has now come into force, allowing the regulators to publish their final rules. The PRA's final rules are the same as those published in August, except for some minor corrections.

The FCA's final rules for UK branches of EEA firms remain unchanged. The rules for UK branches of non-EEA firms have been amended following concerns about the wide extraterritorial reach of the FCA's proposed approach. The FCA will only apply the Certification regime and the Conduct Rules to individuals who perform significant harm functions for branches to individuals who are based in the UK. Other individuals that deal with UK clients will no longer automatically be within scope. The FCA intends to keep the territorial scope of its rules under review and may amend the rules in the future if it considers it necessary to meet its objectives (although not before commencement of the regime in March 2016). The FCA has also confirmed that, in line with legislation, EEA firms that accept deposits or deal in investments as principal under a passport and which have a UK branch are caught by the SM&CR, even if the firm undertakes deposit-taking through a services passport and other (non-deposit-taking) activities through an establishment passport (i.e. if the UK branch does not undertake deposit-taking or proprietary trading).

The final rules on regulatory references will be published by the UK regulators in Q1 2016 as will the PRA's Supervisory Statement on board responsibilities. The FCA final rules on the applicability of the new rules to wholesale trading (to capture algorithmic traders) are also outstanding. The SM&CR comes into effect on March 7, 2016. Certain changes to the regime have been proposed by the UK Government, including extending the regime to all financial services firms and replacing the presumption of responsibility with a duty of responsibility. It remains to be seen whether Parliament will approve those changes.

The PRA's Policy Statement is available at:

http://www.bankofengland.co.uk/pra/Documents/publications/ps/2015/ps2915.pdf and the PRA's updated Supervisory Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ss/2015/ss2815update.pdf.

The FCA's Policy Statement is available at: http://www.fca.org.uk/static/fca/documents/policy-statements/ps15-30.pdf.

Our client note on the Government's proposals is available at:
http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/11/Implementation-Issues-Arising-from-the-Revised-UK-Senior-Manager-and-Certification-Regime-FIA-100215.pdf.

UK Presumption of Responsibility for Senior Managers Put on Hold

On December 17, 2015, an amending Order was published which stops certain provisions of the Senior Manager & Certification Regime from coming into effect on March 7, 2016, the date from which the SM&CR becomes effective for banks, building societies, credit unions and investment firms designated by the PRA. The provisions that will not come into effect on March 7, 2016 are: (i) the obligation on firms to notify the PRA or FCA when it knows or suspects that a senior manager or certified person has failed to comply with the conduct rules; and (ii) the presumption of responsibility for senior managers. Certain changes to the regime have been proposed by the UK Government, including extending the regime to all financial services firms and replacing the presumption of responsibility with a duty of responsibility. It

remains to be seen whether Parliament will approve those changes. In the meantime, the PRA advises firms to prepare for implementation of the regime on the basis that the above two provisions will not come into effect in March 2016.

The Order is available at: http://www.legislation.gov.uk/uksi/2015/2055/pdfs/uksi_20152055_en.pdf and the PRA's related statement is available at: http://www.bankofengland.co.uk/PRA/Pages/supervision/strengtheningacc/default.aspx.

Credit Ratings

Final Report on Sound Practices for Large Intermediaries on Credit Assessment Policies

On December 22, 2015, IOSCO published its final report on sound practices at large intermediaries relating to the assessment of creditworthiness and the use of external credit ratings. The report analyses responses to the survey conducted by IOSCO and proposes sound practices for regulators of large intermediary firms to consider in supervising such firms. Large intermediary firms may also find the proposed practices useful when they consider implementing their internal credit assessment policies and procedures. The report is intended to enhance the implementation of the Principles for Reducing Reliance on CRA Ratings issued by the Financial Stability Board. The proposed sound practices for regulators include requiring large intermediaries to: (i) establish an independent credit assessment function; (ii) involve senior management in implementing the credit assessment process; (iii) ensure the relevant committees have sufficient information on the credit risks posed to their firms; (iv) establish an appropriate oversight structure to ensure the credit assessment process is properly implemented; (v) avoid exposure to particular credit risks whenever the firm does not have the internal capability to independently and adequately assess the exposure; (vi) incorporate a wide variety of qualitative measures into robust credit assessment processes; and (vii) avoid mechanistically relying on external credit rating agency ratings.

The report is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD524.pdf.

Derivatives

US Office of the Comptroller of the Currency Issues Quarterly Report on Bank Trading and Derivatives Activities

On December 21, 2015, the OCC issued its Quarterly Report on Bank Trading and Derivatives Activities. According to the report, insured US commercial banks and savings associations reported trading revenue of $5.3 billion in the third quarter of 2015, 3.54 percent ($200 million) lower than the second quarter of 2015 and 5.1 percent ($300 million) down from the third quarter of 2014. Drivers of bank trading revenue included interest rate and foreign exchange contracts, totaling $4.5 billion in the third quarter, though the strong performance was more than offset by weakness from equities. The report also showed that credit exposures from derivatives rose sharply in the third quarter. While the notional amount of derivatives held by insured US commercial banks declined $6 trillion, or 3 percent, during the third quarter to $192 trillion, the decline is not reflective of current activity. According to the OCC, there continues to be significant new business at the dealer firms, but trade compression is more than offsetting normal growth.

The OCC's Quarterly Report on Bank Trading and Derivatives Activities is available at: http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq315.pdf.

US Commodity Futures Trading Commission Approves Final Rule Relating to Recordkeeping for Certain Market Participants

On December 18, 2015, the US Commodity Futures Trading Commission approved a final rule to amend CFTC Regulation 1.35(a) regarding recordkeeping requirements applicable to certain market participants. The rule would exclude certain market participants from various written and oral recordkeeping requirements and clarify requirements regarding the manner in which records must be kept.

Existing CFTC Regulation 1.35(a) requires merchants, retail foreign exchange dealers, introducing brokers, and members of a designated contract market or of a swap execution facility, including DCM or SEF members that are not registered with the CFTC, to keep records of their business of dealing in commodity interest transactions and related cash or forward transactions. In addition, these market participants must also keep records of written or oral communications that lead to the execution of a commodity interest transaction and related cash or forward transactions.

Under the amended rule, DCM or SEF members not registered with the CFTC are only required to keep records of their business of dealing in commodity interest transactions and related cash or forward transactions, and not pre-trade communications. Additionally, commodity trading advisers that are members of a DCM or of a SEF are excluded from the requirement to record and keep oral communications that lead to the execution of a commodity transaction.

The CFTC's final rule is available at:
http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister121815.pdf.

US Commodity Futures Trading Commission Approves Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

On December 16, 2015, the CFTC approved a final rule and an interim final rule imposing margin requirements for uncleared swaps entered into by covered swap entities (i.e., swap dealers and major swap participants that are not subject to regulation by any of the various US prudential regulators) with financial entities. The rules are substantially similar to those adopted by the US prudential regulators in October 2015, except with respect to certain inter-affiliate transactions, and are generally in line with international standards issued in 2013 by the Basel Committee and IOSCO.

The rules do not apply to commercial end users, but do impose margin requirements on: (i) trades between covered swap entities and swap dealers or major swap participants; and (ii) trades between covered swap entities and certain financial end users. With respect to initial margin, the rules require two-way initial margin for all trades between covered swap entities and swap dealers or major swap participants and trades between covered swap entities and financial end users that have over $8 billion in gross notional exposure in uncleared swaps.

With regard to variation margin, the rules require daily cash payment of variation margin for all trades between covered swap entities and swap dealers or major swap participants and daily posting of variation margin for all trades between swap dealers or major swap participants and financial end users. In contrast to initial margin, the gross notional threshold would not apply for variation margin so financial end users with gross notional exposure below the $8 billion threshold would also be required to exchange variation margin.

Notably, the rules generally exempt inter-affiliate swaps from initial margin requirements except under certain circumstances, but would still require the exchange of variation margin among affiliates. Initial margin requirements will be phased in starting September 1, 2016, and ending September 1, 2020, from the largest participants to smaller ones, whereas variation margin requirements will be effective September 1, 2016, for the largest participants and March 1, 2017, for the rest.

The final rule is available at:
http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister121615.pdf and the CFTC fact sheet regarding the final rule is available at:
http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/uncleardmargin_factsheet121615.pdf.

US Commodity Futures Trading Commission Proposes Enhanced Rules on Cyber Security for Derivatives Clearing Organizations, Trading Platforms and Swap Data Repositories

On December 16, 2015, the CFTC proposed two rules which would amend its system safeguards rules relating to cyber security testing and other safety requirements for automated systems used by entities regulated by the CFTC. One of the

proposed rules pertains to designated contract markets, swap execution facilities, and swap data repositories, while the other pertains to derivatives clearing organizations.

The proposed rules are intended to improve existing requirements with respect to cyber security testing and system safeguards by defining five types of cyber security testing vital to a comprehensive system safeguards program: (i) vulnerability testing; (ii) penetration testing; (iii) controls testing; (iv) security incident response plan testing; and (v) enterprise technology risk assessment. For certain specified entities the proposals also provide minimum frequency of testing requirements and would require such entities to have certain tests performed by independent contractors. The proposals will be open for public comment during a 60-day comment period after their publication in the Federal Register.

The proposed rule for system safeguards testing requirements is available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister121615a.pdf.

The proposed rule for system safeguards testing requirements for derivatives clearing organizations is available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister121615b.pdf.

The CFTC fact sheet regarding the proposed rules is available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/syssafeguard_factsheet121615.pdf.

US Commodity Futures Trading Commission Issues Staff Advisory Regarding Swap Dealer and Major Swap Participant Reporting Obligations

On December 17, 2015, the CFTC's Division of Swap Dealer and Intermediary Oversight issued a staff advisory to swap dealers and major swap participants as a reminder of swap data reporting obligations under CFTC Regulations 23.204 and 23.205. Pursuant to the regulations, SDs and MSPs must report all applicable information and data detailed in Parts 43 and 45 of the CFTC's regulations. In the advisory, CFTC staff also provide examples of common problems they have observed with regard to swap data reporting along with guidance to address such issues.

The CFTC staff advisory is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-66.pdf.

Buy-side Firms Commit to Central Clearing of Single-Name CDS

On December 16, 2015, the International Swaps and Derivatives Association, Inc., the Managed Funds Association and the Asset Management Group of the Securities Industry and Financial Markets Association announced that 25 buy-side firms had voluntarily committed to clearing their single-name credit default swap trades through central counterparties. Clearing of such trades will be the priority with existing positions being migrated over time. The firms are: AB, Anchorage Capital Group, Apollo Global Management, LLC, AQR Capital Management, LLC, BlackRock Inc., BlueMountain Capital Management, LLC, Brigade Capital Management, Citadel LLC, Claren Road Asset Management, LLC, Cyrus Capital Partners, LP, DCI, LLC., DW Partners, LP, Eaton Vance Management, Field Street Capital Management, LLC, Gracie Asset Management, Hutchin Hill Capital LP, Kingdon Capital Management, LLC, Marathon Asset Management, LP, MKP Capital Management, LLC, Och-Ziff Capital Management Group, PIMCO, Pine River Capital Management, Saba Capital Management, L.P., UBS O'Connor LLC and Zais Group, LLC.

The announcement is available at: http://www2.isda.org/news/25-investment-management-firms-commit-to-single-name-cds-clearing.

Committee on Payments and Market Infrastructures and International Organization for Securities Commissions Consultation on Harmonization of the Unique Product Identifier Launched

On December 17, 2015, the Committee on Payments and Market Infrastructures and the Board of IOSCO published proposed guidance on the Unique Product Identifier which will allow for the identification of OTC derivatives products that authorities require, or may require in the future, to be reported to trade repositories. The UPI is made up of an OTC

derivatives products classification system and an associated code (i.e., how the UPI will be represented in trade reports). A separate consultation will be launched on the code at a later date. Currently, OTC derivative trades are reported to 20 trade repositories authorized for some asset classes. However, in order to properly mitigate systemic risk and protect against market abuse, it is necessary for data across trade repositories to be aggregated so that national regulators have a comprehensive view of the OTC derivatives markets and trading activity. The CPMI and IOSCO have been tasked by the Financial Stability Board with developing global guidance on the harmonization of data elements reported to trade repositories, including a Unique Transaction Identifier and a UPI. The CPMI and IOSCO are proposing principles and high-level business specifications for the UPI as well as two approaches for the granularity of the UPI classification system. In particular, feedback is sought on potential implementation challenges. The consultation closes on February 24, 2016.

The consultation paper is available at: http://www.bis.org/cpmi/publ/d141.pdf.

Enforcement

The US Securities and Exchange Commission and Commodity Futures Trading Commission Issue Orders Against JPMorgan

On December 18, 2015, the US Securities and Exchange Commission and the CFTC each issued orders filing and settling charges against JPMorgan Chase Bank and its subsidiaries. The SEC order found that JPMorgan Chase Bank N.A. and JPMorgan's investment advisory business, JP Morgan Securities LLC, failed to properly disclose their preference to invest clients' funds in the firm's own proprietary investment products, depriving clients of information needed to make fully informed investment decisions. As such, JPMS willfully violated Sections 206(2), 206(4) and 207 of the Investment Advisers Act of 1940 and Rule 206(4)-7 and JPMCB willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933. The subsidiaries agreed to jointly pay $127.5 million in disgorgement, $11.815 million in prejudgment interest, and a $127.5 million penalty. JPMS also agreed to be censured, and both subsidiaries agreed to cease and desist from further violations. In a parallel action, the CFTC ordered JPMCB to pay a $40 million civil monetary penalty, to pay disgorgement in the amount of $60 million, and to cease and desist from further violations as charged. According to the CFTC order, JPMCB failed to disclose certain conflicts of interest to clients of its US-based wealth management business, JPMorgan Private Bank, including its preference for investing client funds in certain commodity pools or exempt pools, namely hedge funds and mutual funds managed and operated by an affiliate and subsidiary of JP Morgan Chase & Co. JPMCB also failed to disclose its preference for investing its clients' funds in certain third-party-managed hedge funds that shared management and/or performance fees with a JPMCB affiliate.

The SEC order is available at: http://www.sec.gov/litigation/admin/2015/33-9992.pdf and the CFTC order is available at:
http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfjpmorganorder121815.pdf.

Threadneedle Asset Management Limited Fined by UK Regulator

On December 10, 2015, the FCA issued Threadneedle Asset Management Limited with a £6,038,504 fine for not having adequate controls in place for its fixed income desk, providing inaccurate information to the FCA and failing to correct its inaccurate representation for four months. Threadneedle was asked in April 2011 by the FCA's predecessor, the Financial Services Authority, to address concerns raised about the number of errors originating from its fixed income desk including its Emerging Markets Debt desk, as well as concerns about fund managers initiating, booking and executing their own trades. Threadneedle advised the FSA that it had employed individuals that had taken on responsibility for all aspects of dealing on those desks. However, the individuals had not actually taken on all the responsibilities. Shortly after Threadneedle's response, a fund manager on the Emerging Markets Debt desk initiated, executed and booked a $150 million trade at four times its market value without having the authority to make the trade.

The trade was not settled as the problem was identified in time by Threadneedle's outsourced back office. The trade—had it not been identified in time, and had gone on to settle—could have caused a $110 million loss to client funds.

The FCA notice is available at: http://www.fca.org.uk/static/fca/documents/final-notices/threadneedle-asset-management.pdf.

Financial Market Infrastructure

Final Draft EU Standards on the Prudential Requirements for Central Securities Depositories Published

On December 16, 2015, the EBA published final draft RTS which set out the prudential regime for central securities depositories under the Central Securities Depositories Regulation. A distinction is made in CSDR between CSDs that offer banking-type ancillary services and which are also authorized as credit institutions (i.e. banks) and CSDs that are not permitted to offer ancillary banking services. The final draft RTS cover: (i) the capital requirements applicable to all CSDs; (ii) the additional risk-based capital surcharge which takes into account the risks, including intra-day credit and liquidity risks, that arise from the ancillary banking services of CSDs; and (iii) the framework and tools for monitoring, measuring, managing, reporting and disclosing the above-mentioned credit and liquidity risks. CSDs that carry out ancillary banking services will also need to comply with the CRR and the final draft RTS impose stricter requirements than those in CRR in some respects. The final draft RTS have been sent to the European Commission for endorsement. The CSDR, which introduces common standards for settlements across the EU, will apply directly across the EU from January 1, 2023 to transferable securities issued after that date and from January 1, 2025 to all transferable securities.

The final draft RTS is available at: http://www.eba.europa.eu/documents/10180/1311085/EBA-RTS-2015-10+Final+draft+RTS+on+CSDs.pdf.

UK Government Publishes New Payment Account Regulations

On December 16, 2015, HM Treasury published the Payment Account Regulations together with an explanatory memorandum. The Regulations implement the Payment Accounts Directive which sets common standards for payment service providers across EU Member States. The three main policy objectives of the PAD are: (i) to improve transparency and comparability of payment account fees used on a daily basis for payment transactions (i.e. personal current accounts); (ii) to make it less burdensome for consumers to be able to move their current account from one payment service provider to another; and (iii) to ensure that EU residents have access to banking services and that a sufficient number of accounts that offer basic features are available. The new Regulations cover: (i) the obligations on payment service providers to enable consumers to make informed choices when choosing a payment account; (ii) non-discrimination in the provision of and access to payments accounts; and (iii) switching payments accounts and the facilitation of cross-border account opening for consumers. The Regulations will enter into force on September 18, 2016 except for those provisions related to the obligation of the FCA to publish a list of the most representative services linked to a payment account and subject to a fee which will come into effect six months after the publication of that list.

The Regulations are available at: http://www.legislation.gov.uk/uksi/2015/2038/pdfs/uksi_20152038_en.pdf.

UK Payment Systems Regulator Report on Access and Governance of Payment Systems

On December 15, 2015, the Payment Systems Regulator published its first annual report on access and governance of payment systems. The report sets out the progress of operators of designated payment systems in achieving more open and flexible direct access to payment systems and making the governance of payment system operators more inclusive and transparent. The report states that operators could do more to enable access for smaller banks and non-bank payment service providers and must ensure that the views of those that rely on payment systems are represented in the decision making of operators. The PSR also reports that progress has been made so far on clearer and fairer

requirements for direct access, transparency of payment system operator decisions and better representation of payment systems' users' views.

The report is available at: https://www.psr.org.uk/sites/default/files/media/PDF/Access-and-governance-report-Dec-2015.pdf.

Financial Services

European Commission to Extend Exemption from Market Abuse Regulation to Certain Third Country Central Banks

On December 16, 2015, the European Commission published a report on the appropriateness of an extension of the exemption from the Market Abuse Regulation to certain public bodies and central banks of third countries. MAR exempts Member States, members of the European System of Central Banks, ministries and other agencies and special purpose vehicles of one or more Member States or persons acting on their behalf from the application of MAR to transactions, orders or behaviour that are undertaken in pursuit of monetary, exchange rate or public debt management policies. The Commission may extend that exemption to certain public bodies and central banks of third countries after assessing and reporting to the European Parliament and European Council on the appropriateness of such an extension. The Commission intends to extend the exemption under MAR to central banks and debt management offices of Australia, Brazil, Canada, Hong Kong SAR, India, Japan, Mexico, Singapore, South Korea, Switzerland, Turkey and the United States and to the central bank of China.

The report is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-647-EN-F1-1.PDF.

EU Legislation Published on Protection of Whistle Blowers under the Market Abuse Directive

On December 18, 2015, a Commission Implementing Directive on the procedures and requirements for protection of individuals that report an actual or potential infringement of the Market Abuse Regulation to a national regulator was published in the Official Journal of the European Union. The Implementing Directive sets out the procedures for reporting, record-keeping requirements, measures for the protection of whistle blowers that are working under a contract of employment and arrangements for the protection of personal data of whistle blowers. Member States must transpose the requirements of the Implementing Directive into their national laws by July 3, 2016 and apply the new legislation from that date. The Market Abuse Regulation sets out the EU requirements on insider dealing, the unlawful disclosure of inside information and market manipulation and will apply directly across the EU from July 3, 2016.

The Implementing Directive is available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2015.332.01.0126.01.ENG.

European Commission Consults on Long-Term and Sustainable Investment

On December 18, 2015, the European Commission launched a consultation which seeks to collect information on how institutional investors, asset managers and other service providers in the investment chain take into account, for the purpose of investment decisions, sustainability information and performance of companies or assets. The consultation is linked to the Commission's Communication on Long-Term Financing of the European Economy as well as the action plan for building a Capital Markets Union. The consultation is open until March 25, 2016.

The consultation is available at: https://ec.europa.eu/eusurvey/runner/longtermandsustainableinvestment.

Funds

US Securities and Exchange Commission Issues Staff Report on Definition of "Accredited Investor"

On December 18, 2015, the SEC released a staff report that discusses ways to modify the definition of accredited investor, a term used to establish eligibility to participate in private securities offerings under US law. Under the Dodd-

Frank Wall Street Reform and Consumer Protection Act, the SEC is required to review the accredited investor definition as it relates to natural person investors every four years. Among other things, the staff report explores the history of the definition and provides alternative methods and staff recommendations related to re-defining the existing definition. The report also considers comments on the definition derived from various sources, including public commenters. The SEC is soliciting public comment on the definition, generally, and on the staff report.

The SEC press release, including the link to submit comments, is available at: http://www.sec.gov/news/pressrelease/2015-284.html and the report is available at: http://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf.

US Securities and Exchange Commission Proposes New Derivatives Rules for Registered Funds and Business Development Companies

On December 11, 2015, the SEC issued a proposed rule for public comment that would limit the use of derivatives and require new risk management measures by registered investment companies, including mutual funds, exchange-traded funds, closed-end funds, and business development companies. The proposed rule would require a fund to comply with one of two portfolio limitations, which would cap the amount of leverage a fund may obtain from derivatives and other specified transactions. Specifically, the rule would limit a fund's aggregate derivatives exposure to 150 percent of the fund's net assets, or up to 300 percent of the fund's net assets provided that the fund satisfies a risk-based test based on value-at-risk. A formal derivatives risk management program overseen by a designated derivatives risk manager would be required if a fund engages in more than the limited amount of derivatives transactions or if it uses complex derivatives. In addition, a fund would have to manage the risks related to their use of derivatives by segregating certain assets, generally cash and cash equivalents, in an amount sufficient to ensure that the fund meets its obligations. Funds would also be required to segregate certain assets to cover its obligations related to certain financial commitment transactions, such as reverse repurchase agreements and short sales. The proposed rule will be open for public comment for 90 days following its publication in the Federal Register.

The SEC press release and proposed rule are available at: http://www.sec.gov/news/pressrelease/2015-276.html and http://www.sec.gov/rules/proposed/2015/ic-31933.pdf.

International Organization for Securities Commissions Publishes Report on Liquidity Risk Management Tools for Collective Investment Schemes

On December 17, 2015, IOSCO published a report on the existing tools available to fund managers for liquidity management in collective investment schemes. The report, which covers the frameworks in 26 jurisdictions, provides a global view of the tools available to fund managers, particular in extreme situations, and the funds to which those tools apply, including the availability of tools in particular jurisdictions, their use and effectiveness and any system-wide implications that the tools pose. The report is part of IOSCO's work on the collection of data about asset management activity. IOSCO is considering developing guidance on liquidity risk management that would go beyond its 2013 Principles of Liquidity Risk Management for Collective Investment Schemes, which would include stress testing.

The report is available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD517.pdf and the Principles are available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD405.pdf.

MiFID II

Final EU Guidelines for the Assessment of Knowledge and Competence Under MiFID II

On December 17, 2015, the European Securities and Markets Authority published a final report and final guidelines on the assessment of knowledge and competence of individuals providing investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of investment firms. Under the revised Markets in Financial Instruments Directive, an investment firm is required to ensure that individuals giving investment

advice or providing information about financial instruments, investment services or ancillary services to clients on its behalf have the necessary knowledge and competence to do so and to satisfy the firm's obligations on suitability, appropriateness and reporting and provision of information to clients. An investment firm may be requested to demonstrate that the requirements are met on request by its national regulator. National regulators must publish the criteria that will be used to assess such knowledge and competence. ESMA's guidelines, which apply to national regulators and investment firms, specify the criteria for the assessment of knowledge and competence, establishing the minimum standards that staff providing the relevant services should meet. The guidelines will come into effect on January 3, 2017.

The guidelines are available at: https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-report-mifid-ii-guidelines-assessment-and-knowledge.

Final EU Guidelines on Cross-Selling Practices Published

On December 22, 2015, ESMA published a final report and final Guidelines on cross-selling practices within the meaning of the revised MiFID. The Guidelines will apply from January 3, 2017 to the national regulators responsible for the conduct of business supervisory oversight of investment firms and credit institutions when providing investment services and to management companies and external Alternative Investment Fund Managers when they provide investment services under the Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities and the Alternative Investment Fund Managers Directive respectively. Initially, ESMA had consulted jointly with the European Banking Authority and European Insurance and Occupational Pensions Authority on joint guidelines for the banking and insurance sectors. However, following feedback received to that consultation, it was decided that ESMA should adopt guidelines solely on the basis of the revised MiFID. Firms should note, however, that the final Guidelines do not affect their obligations to comply with other conduct of business standards that may be applicable to them.

The final Guidelines contribute to investor protection across the EU by establishing an approach to the supervision of the standard of conduct and organizational arrangements for firms that engage in cross-selling practices, in particular, to the offering of two or more financial products or services as part of a package or as a condition for the same agreement or package. The Guidelines, which include illustrative examples, aim to improve the content of the disclosure, display and communication of price and cost information and of non-price features and risks, improve client understanding of whether the purchase of individual products is possible through enhanced display and communication of options to purchase, adequate training for relevant staff, removal of conflicts of interest in the remuneration structures of sales staff and clarification of the application of post-sale cancellation rights attached to the purchase of one of the products.

The final report and final guidelines are available at: https://www.esma.europa.eu/press-news/esma-news/esma-publishes-mifid-ii-guidelines-cross-selling-practices.

UK Regulator Consults on Implementing the Revised Markets in Financial Instruments Directive

On December 15, 2015, the FCA published proposals for implementing certain aspects of the revised MiFID, which together with the Markets in Financial Instruments Regulation is known as MiFID II. The revised MiFID must be transposed into the national laws of Member States whereas MiFIR is directly applicable across the EU. MiFID II is currently due to apply from January 3, 2017 although there have been discussions between the European authorities about possibly delaying this date. On the existing timeline, Member States must transpose the revised MiFID into their national laws by July 3, 2016.

The FCA's consultation covers broadly the following topics: (i) algorithmic trading and high frequency trading requirements for regulated markets, multilateral trading facilities and organized trading facilities, including business continuity, systems and controls, financial crime, market abuse, direct electronic access and tick sizes; (ii) new

transparency requirements for equity-like and non-equity markets, including pre-transparency waivers and post-transparency deferrals; (iii) requirements for OTFs, a new type of trading venue introduced by MiFID II; (iv) requirements for data reporting services providers, a new type of firm under MiFID II; (v) extension of the Principles of Business to firms that conduct business with Eligible Counterparty clients; (vi) changes applicable to systematic internalisers; and (vii) passporting requirements and requirements for UK branches of non-EEA firms.

The FCA is also consulting on proposed changes to its Perimeter Guidance manual to take into account the expanded scope of MiFID II for investment services, activities and financial instruments. The FCA has prepared a proposed MiFID II Handbook Guide for trading venues and data reporting service providers which sets out the FCA's proposed approach to implementing MiFID II. The FCA will consider expanding the Guide to other firms as the FCA consults on implementing other aspects of MiFID II.

For directly applicable regulations, the FCA intends to include references to the relevant regulations in its Handbook. That approach will apply subject to certain exceptions, such as when the FCA exercises a discretion provided for under the relevant regulation. Responses to the consultation are due by March 8, 2016. A Policy Statement and final rules on the areas covered in this consultation will be published in the Q2 2016. The FCA intends to issue further consultations on the implementation of MiFID II in the first half of 2016 covering amendments on conduct of business, senior management systems and controls, client assets and enforcement.

The consultation paper is available at: http://www.fca.org.uk/static/documents/consultation-papers/cp15-43.pdf.

Recovery & Resolution

US Office of the Comptroller of the Currency Proposes Guidelines Establishing Standards for Recovery Planning

On December 17, 2015, the OCC proposed guidelines which would establish minimum standards for recovery planning for insured national banks, insured federal savings associations, and insured federal branches of foreign banks with average total consolidated assets of $50 billion or more. The proposed guidelines would require covered institutions to develop and maintain a recovery plan, commensurate with its risk profile and activities, that establishes quantitative and qualitative indicators of risk (based on severe stress scenarios) that would require escalation to the institution's board of directors or senior management for purposes of initiating a response. The plans must also identify and evaluate a wide range of potential recovery options the covered bank would take to permit the entity to avoid liquidation or resolution. The proposed guidelines would require review of the plan by the institution's board and management at least annually. Management should revise the plan as necessary to reflect material changes to the bank's risk profile or activities. The notice of proposed rulemaking is open for public comment for 60 days. The guidelines would be enacted as an appendix to the OCC's regulations on safety and soundness standards. Under the proposed guidelines, if a covered bank does not meet the standards of the guidelines, the OCC could take enforcement action pursuant to the Federal Deposit Insurance Act.

OCC Bulletin 2015-50 announcing the notice of proposed rulemaking is available at: http://www.occ.treas.gov/news-issuances/bulletins/2015/bulletin-2015-50.html.

The proposed guidelines are available at: https://www.federalregister.gov/articles/2015/12/17/2015-31658/guidelines-establishing-standards-for-recovery-planning-by-certain-large-insured-national-banks#h-10.

EU Final Draft Standards on the Valuation of Derivative Liabilities for Bail-in

On December 17, 2015, the EBA published final draft RTS on the valuation of derivatives for the purpose of bailing in derivative liabilities. Under the BRRD, a resolution authority may bail-in relevant derivative liabilities provided that the authority complies with certain conditions including exercising the bail-in power only upon or after closing out the derivatives and ensuring that derivatives subject to a netting agreement are bailed-in on a net basis following the terms

of the netting agreement. Before exercising the bail-in power, a resolution authority is required to ensure that an independent valuation of the assets and liabilities of a firm is carried out. For derivative liabilities, the valuation will determine a value of those derivative liabilities at the moment of exercise of the resolution power. The EBA's final draft RTS provide a methodology for resolution authorities to follow when comparing the destruction in value that would arise from the close-out with the losses that those derivatives would incur in a bail-in, principles for determining the point in time at which the value of a derivative should be established and measures for establishing the value of classes of derivatives. The EBA has submitted the final draft RTS to the European Commission for endorsement. Member states are required to implement the bail-in tool by January 1, 2016.

The final draft RTS is available at: http://www.eba.europa.eu/documents/10180/1312572/EBA-RTS-2015-11+RTS+on+the+valuation+of+derivatives.pdf.

EU Final Draft Standards and Guidelines on Business Reorganization Plans Following a Bail-in

On December 17, 2015, the EBA published final draft RTS and final guidelines on the business reorganization plans that a firm that has been recapitalized using the bail-in tool is required to produce. Under the BRRD, a firm that has been recapitalized through a bail-in must: (i) produce a reorganization plan that sets out how the firm will be restored to long-term viability; (ii) submit progress reports twice annually throughout the reorganization period. The BRRD requires the EBA to develop RTS on the minimum content of the business reorganization plans and progress reports and to issue guidelines for national regulators and resolution authorities to assess the reorganization plan. The final draft RTS require a business plan to identify and address the cause of the firm's failure, demonstrate that the firm can operate viably in the long-term, address shortcomings in the firm's business model (even if not related to the firm's failure), include financial performance projections with relevant milestones and indicators. The progress report should report on implementation of the reorganization plan and include proposed amendments to the plan, if necessary. The EBA's guidelines provide national regulators and resolution authorities with the means to assess whether the business reorganization plan is credible and realistic and consistent with other business plans prepared by the firm in parallel. Verification by independent entities, such as auditors, should be possible, where necessary.

The final draft RTS and guidelines are available at: http://www.eba.europa.eu/documents/10180/1312804/EBA-RTS-2015-12+RTS+and+EBA-GL-2015-21+GLs+on+Business+Reorganisation+Plans.pdf.

EU Final Standards on Requirements for Firms to Hold Information on Financial Contracts

On December 17, 2015, the EBA published final draft RTS specifying the information on financial contracts that a firm may be required to maintain. The BRRD gives resolution authorities the power temporarily to suspend the termination rights of any counterparty to a contract with a firm that is under resolution. Both national regulators and resolution authorities may require a firm to maintain detailed records of financial contracts (generally, these are securities contracts, commodities contracts, futures and forwards contracts, swap agreements, inter-bank borrowing agreements) on whether or not they include suspensory provisions. The EBA's final draft RTS set out the minimum set of information on financial contracts that should be included in the detailed records held by a firm which includes information such as whether a contract includes contractual recognition of resolution powers, information on value and valuation, collateral, termination rights, maturity and netting arrangements. The RTS also prescribe the circumstances in which the requirement to hold such records should be imposed and take a wide approach by including all firms or entities that might be subject to resolution actions. The EBA considers that firms that would be placed into an insolvency procedure need not be included but the European authority does not prohibit national regulators or resolution authorities from imposing similar requirements on such firms, or any other firms.

The final draft RTS is available at: http://www.eba.europa.eu/documents/10180/1312738/EBA-RTS-2015-13+RTS+on+detailed+records+of+financial+contracts.pdf.

UK Government Proposes Changes for Implementation of the Bank Recovery and Resolution Directive

On December 17, 2015, the UK Government launched a consultation on further proposals for implementing the BRRD into UK law following the identification of a few changes that the Government believes will clarify and strengthen the UK's transposition of the BRRD. The proposals would amend the Banking Act 2009, the Financial Services and Markets Act 2000 and certain secondary legislation and a draft Order was published with the consultation paper. In summary, the Government is proposing to: (i) provide that the Bank of England or HM Treasury may decide, on a case-by-case basis, that a default event provision in a contract with a firm that is subject to resolution should come into effect; (ii) introduce specific powers for the PRA and FCA to require the removal and replacement of directors and senior managers and to appoint temporary managers (which would normally be called administrators but the Government is keen to avoid confusion of terms that are used when a firm is put into administration). Such powers would form part of the regulators' more general early intervention powers and, as is the case under the BRRD, would not require any fault on behalf of the individual to be proved before such power could be utilized; (iii) give the PRA and FCA specific powers to convene a meeting of shareholders themselves; (iv) introduce new powers for the BoE to resolve a branch of a third country firm, independently of the third country resolution authority, subject to certain conditions being met. The Government considers that the circumstances where such powers would be used would be exceptional because of all the work at international level to ensure that resolution authorities co-operate when a cross-border bank is under resolution. The BoE would still have the power, subject to certain conditions being met, to transfer some or all of the assets, rights and liabilities of a UK branch to a private sector purchaser, a bridge bank or an asset management vehicle and the power to bail in liabilities in connection with such transfer. Any resolution action taken for a UK branch of a third country firm would benefit from safeguards and compensation arrangements, such as "no creditor worse off" compensation. The consultation closes on February 25, 2016.

The consultation is available at: https://www.gov.uk/government/consultations/consultation-on-the-implementation-of-the-bank-recovery-and-resolution-directive-brrd.

International Report on Trading Venue Business Continuity Plans Published

On December 22, 2015, IOSCO published a report on the mechanisms for trading venues to effectively manage electronic trading risks and plans for business continuity. The report focuses on how trading venues manage technology, in particular, the potential risks that technological innovations pose to the markets. It stems from an IOSCO investigation into causes of the recent market disruptions which sought to identify steps taken by market participants and regulators to address the causes and probe whether the IOSCO High-Level Principles for Business Continuity issued in 2006 should be updated. In addition, IOSCO surveyed trading venues across more than 30 jurisdictions. The report discusses IOSCO's findings based on responses to the survey, makes recommendations to regulators and proposes sound practices for trading venues. IOSCO recommends that regulators should require trading venues to put mechanisms in place to help ensure the resiliency, reliability and integrity of critical systems and should require trading venues to establish, maintain and implement an appropriate business continuity plan. The proposed sound practices for trading practices include: (i) establishing and implementing policies and procedures that identify, monitor and address risks to critical systems; (ii) implementing mechanisms for critical systems that relate to capacity management, stress testing and systems reviews; (iii) establishing and implementing communication protocols that govern the sharing of information on new critical systems, or changes to existing critical systems; (iv) establishing and implementing mechanisms to manage external risks to critical systems, such as mechanisms to monitor a participant's compliance with the rules of the trading venue, pre-trade controls and post-trade monitoring; (v) establishing, implementing and updating cyber security programs; and (vi) establishing objectives and strategies in terms of business continuity planning and governance arrangements on planning for disruption.

The report is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD522.pdf.

International Report on Market Intermediary Business Continuity and Recovery Planning Published

On December 22, 2015, IOSCO published a report on market intermediary business continuity and recovery planning. The report sets two standards for regulators of market intermediaries and recommends sound practices for regulators to consider in their supervision of market intermediaries. The IOSCO standards state that regulators should require market intermediaries to create and maintain written business continuity plans and to update the plans in the event of any material change to the intermediaries' operations, structure, business or location and to conduct an annual review of the plan. The IOSCO recommendations on sound practices for regulators of intermediaries cover setting the components of a market intermediary's business continuity plan and addressing the need for data protection and client privacy, in particular, against cyber-attacks. IOSCO recognizes that the sound practices are flexible and may be tailored to the size and needs of a market intermediary.

The report is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD523.pdf.

Shadow Banking

Basel Committee on Banking Supervision Consults on Addressing Step-in Risk

On December 17, 2015, the Basel Committee launched a consultation on the identification, assessment and measurement of step-in risk. The proposed framework would form the basis for identifying, assessing and addressing step-in risk that is potentially embedded in banks' relationships with shadow banking entities. The Basel Committee refers to step-in risk as the risk that a bank may provide financial support to an entity that is under financial stress beyond or without any contractual obligations to do so to protect itself from any adverse reputational risk that may result from its connection to the entity. The proposals only apply to unconsolidated entities (i.e. entities that are outside of the regulatory scope of consolidation). The proposed framework includes descriptions of the relationships and indicators that characterize such relationships between banks and shadow banking entities, such as capital ties, sponsorship, provision of financial facilities, decision-making and operational links. The Basel Committee proposes that any step-in risk that is identified could be addressed through prudential measures, such as through quantitative requirements or by bringing the relevant entity within regulatory consolidation. The consultation closes on March 17, 2016.

The consultation paper is available at: http://www.bis.org/bcbs/publ/d349.pdf.

People

US Consumer Financial Protection Bureau Announces New General Counsel

On December 16, 2015, the CFPB announced that Mary McLeod will join the CFPB as General Counsel, upon the departure of current General Counsel and Acting Deputy Director Meredith Fuchs in early 2016.

The press release is available at: http://www.consumerfinance.gov/newsroom/cfpb-announces-new-general-counsel/.

Single Resolution Board Appoints Appeal Panel Members

On December 18, 2015, the Single Resolution Board announced the first members appointed to its Appeal Panel. The nominated members are: Ms Hélène Vletter Van Dort (Chair), Mr Yves Herinckx (Vice-Chair), Mr Kaarlo Jännäri, Mr Marco Lamandini, Mr Christopher Pleister. Ms Eleni Dendrinou-Louri and Mr Luis Silva Morais have been nominated as alternates to the Appeal Panel. The appointments are for a term of five years, starting on January 1, 2016. The Appeal Panel is established to hear appeals brought by individuals or legal persons, including resolution authorities, against a decision of the SRB that is either addressed, or of direct and individual concern, to that person.

The announcement is available at: http://srb.europa.eu/.

Re-appointment of UK Members of Financial Policy Committee Announced

On December 15, 2015, the UK Chancellor of the Exchequer, George Osborne, announced that Dame Clara Furse and Richard Sharp had been re-appointed as external members to the Financial Policy Committee at the Bank of England. Their terms of appointment will now run until March 31, 2019.

The announcement is available at: https://www.gov.uk/government/news/dame-clara-furse-and-richard-sharp-re-appointed-to-the-financial-policy-committee.

International Organization of Securities Commissions New Secretary General

On December 16, 2015, IOSCO announced it appointed Paul Andrews as its new Secretary General, replacing David Wright from March 2016 for a three-year term.

The press release is available at: http://www.iosco.org/news/pdf/IOSCONEWS409.pdf.

Upcoming Events

January 5, 2016: EBA Public Hearing on Draft Guidelines on Communication between National Regulators Supervising Credit Institutions and their Auditors (registration closed).

January 13, 2016: EBA Public Hearing on Disclosure of Confidential Information in Summary or Collective Form under the BRRD (registration closes: December 23, 2015).

January 18, 2016: EBA Public Hearing on Common Procedures for Information Exchange between National Regulators on Proposed Acquisitions and Increases of Qualifying Holdings (registration closes: January 4, 2016).

January 25, 2016: ESMA Open Hearing on Validation and Review of Credit Rating Agency Methodologies (registration closes: January 26, 2016).

January 25, 2016: EBA Public Hearing on Assessment Methodology on Use of Internal Models for Market Risk (registration closes: January 11, 2016).

February 16, 2016: EBA Open Hearing on Guidelines on the collection of information for the ICAAP and ILAAP (registration closes: January 26, 2016).

Upcoming Consultation Deadlines

December 27, 2015: ESMA Consultation on Indirect Clearing under EMIR and Markets in Financial Instruments Regulation.

December 28, 2015: FDIC FAQs on Brokered Deposits.

January 6, 2016: European Commission Consultation on EU Covered Bond Framework.

January 6, 2016: European Commission Consultation on EU Venture Capital Investment Funds Regulation and European Social Entrepreneurships Funds Regulation.

January 13, 2016: EBA Consultation on Draft RTS on Cross Border Intragroup Liquidity Flows.

January 14, 2016: European Commission Consultation on Impact of Maximum Remuneration Ratio between Variable to Fixed Remuneration and Overall Efficiency of Remuneration Rules.

January 15, 2016: PRA Consultation on Implementation of Ring Fencing for Core UK Financial Services and Activities.

January 18, 2016: ESMA Consultation on RTS for the European Single Electronic Format under the Transparency Directive.

January 18, 2016: PRA Consultation on Identifying Other Systemically Important Institutions.

January 22, 2016: EBA Consultation on Draft Guidelines on Application of Definition of Default under the CRR.

January 22, 2016: ESAs Consultation on Anti Money Laundering Guidelines.

January 27, 2016: EBA Consultation on Draft Guidelines for Disclosure of Confidential Information under the BRRD.

January 28, 2016: EBA Consultation on Draft Guidelines on Treatment of Credit Valuation Adjustment Risk under the Supervisory Review and Evaluation Process.

February 1, 2016: Federal Reserve Board TLAC and Related Requirements Proposal.

February 1, 2016: ESMA Consultation on Revised RTS on data access and operational standards for comparison and aggregation of data.

February 1, 2016: ESMA Consultation on CCP Time Horizon for Liquidation Period.

February 1, 2016: ESMA Consultation on CCP Time Horizon for Liquidation Period.

February 4, 2016: FCA Consultation on Implementation of Market Abuse Regulation.

February 5, 2016: Basel Committee Consultation on Capital Requirements for Simple, Transparent and Comparable Securitizations.

February 8, 2016: EBA Discussion Paper on RTS for Strong Customer Authentication and Secure Communication under the Revised Payment Services Directive.

February 10, 2016: EBA Consultation on Common Procedures for Information Exchange between National Regulators on Proposed Acquisitions.

February 12, 2016: Basel Committee Consultation on TLAC Holdings.

February 19, 2016: ESMA Discussion Paper on Validation and Review of CRA Methodologies.

February 19, 2016: US Federal Reserve Board Framework for Implementing the Basel III Countercyclical Capital Buffer.

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

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

February 25, 2016: UK Government Proposes Changes for Implementation of the BRRD.

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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