ALLEN & OVERY

Key Regulatory Topics: Weekly Update

10 January – 16 January 2020

BREXIT

Please see our section on Other Developments for the FCA's regulation round-up for January which updates on the FCA's Brexit implementation activities.

EC publish slides on the future relationship between the EU and UK in preparation for negotiations

On 10 January, the EC published slides on the future relationship between the EU and UK in preparation of negotiations, setting out its view on data protection and financial services. On data protection the Commission sets out the steps required for an adequacy assessment and possible decision. On financial services, the aim is (i) a balanced, ambitious and wide-ranging free trade agreement "insofar as there are sufficient guarantees for a level playing field"; (ii) safeguarding financial stability in the Union and respecting its regulatory and supervisory regime and standards and their application in any future framework; and (iii) approaching the future relationship with high ambition with regard to its scope and depth, but not amounting to obligations or benefits of membership. The negotiating agenda sets out (a) principles of cooperation; (b) regulatory and supervisory cooperation; and (c) equivalence assessments. Parties should start assessing equivalence as soon as possible after the UK's withdrawal, endeavouring to conclude assessments before the end of June. The EU is to be led by its interests which are (1) preserving financial stability; (2) market integrity; (3) investor and consumer protection; (4) fair competition; and (5) further development of EU policies, in particular Capital Markets Union and Banking Union. On 16 January, the EC published slides on preparatory discussions on the future relationship between the UK and EU in regard to law enforcement and judicial cooperation in criminal matters, covering anti-money laundering (AML) and counter terrorism financing (CTF). The EC places emphasis on compliance with the Financial Action Task Force (FATF) standards. Furthermore, Political Declaration 89 is highlighted which contains an agreement for the Parties to go beyond the FATF standards with regard to beneficial ownership transparency and ending the anonymity associated with the use of virtual currencies.

Slides on data protection and financial services

Slides on law enforcement and judicial cooperation

CONSUMER/RETAIL

FCA update on the evaluation of the Retail Distribution Review (RDR) and the Financial Advice Market Review (FAMR)

On 14 January, the FCA updated its webpage on the evaluation of the RDR and the FAMR. This explains further progress on the FCA's work since July 2019 and sets out their next steps. The FCA will continue with its consumer research and the analysis of firm data, assessing whether there are any gaps between the products and services firms are offering and what consumers need and want. The FCA will continue to work closely with other organisations and stakeholders, keen to understand the impact technology has had on the market and the potential for it to help meet current and future consumer needs. The FCA want to explore further the potential for new services to emerge in the market, interested in particular in alternative advice services and unregulated information services. The FCA want to hear from firms about the effect open finance could have on the market. Firms are also invited to comment on barriers that they are facing in the

use of technology in making efficiencies. The FCA expect to publish their final RDR/FAMR Review report later in Autumn 2020.
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FINANCIAL CRIME

Please see our Investigations Insight Blog on the key changes made on 10 January to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs) by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019. The amendments were only published on 20 December, which has not left businesses much time to review the changes. For those businesses already subject to the MLRs, the changes largely require checking and refining existing policies and procedures. The biggest changes are reserved for new businesses falling in scope.

Please see our Brexit section for an update on preparatory discussions on the future relationship between the EU and UK covering anti-money laundering (AML) and counter terrorism financing (CTF).

FCA becomes anti-money laundering (AML) and counter-terrorist financing (CTF) supervisor of UK cryptoasset activities

On 10 January, the FCA became the AML and CTF supervisor of cryptoasset activities. Cryptoasset businesses carrying on certain activities must comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations (MLRs) from 10 January 2020, these activities being (i) cryptoasset exchange providers including Cryptoasset Automated Teller Machine (ATM), Peer to Peer Providers and Issuing new cryptoassets; and (ii) custodian wallet providers.
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FINTECH

Please see the Taxes/Levies section for an update on the FCA publishing the Fees (Cryptoasset Business) Instrument 2020.

Please see the Financial Crime section for an update on the FCA becoming the anti-money laundering (AML) and counter-terrorist financing (CTF) supervisor of UK cryptoasset activities.

Global Financial Innovation Network (GFIN) report on its cross-border testing pilot

On 16 January, GFIN published a report on its cross-border testing pilot and of lessons learnt and next steps. Applications for the first formal cohort of participants will open in H1 2020. There will be a single application form and a regulatory compendium has been published on GFIN's new website to better inform firms about GFIN's members, each regulator's geographical jurisdiction, the types of innovation services it offers and whether or not it participates in the cross-border testing programme.
Read more

FUND REGULATION

FCA new webpage on asset management portfolio tools

On 13 January, the FCA published a new webpage on asset management portfolio tools. This sets out their report and review findings of how firms in the asset management sector selected and used risk modelling and other portfolio management tools. The review's purpose was to assess how asset management firms select, use and oversee the tools and models they use to manage portfolios. Their review identified problems in firms' processes and controls, particularly in risk model oversight and contingency planning. The review applies to all firms in the asset management sector and they should consider the findings in terms of how to apply them to their own organisations. The webpage gives detail on the (i) FCA's findings; (ii) the advantages and disadvantages of different approaches; (iii) model governance; (iv) managing change; (v) resilience and recovery; (vi) testing of software; and (vii) customer expectations. The FCA will continue to look at resilience arrangements in place at firms, including those which were not included in the review.
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MARKETS AND MARKETS INFRASTRUCTURE

International Organization of Securities Commissions (IOSCO) on synchronising clocks used for timestamping with co-ordinated universal time

On 16 January, IOSCO published its final report on synchronising business clocks used for timestamping with co-ordinated universal time. It recommends that Market Authorities should consider requiring Trading Venues and their participants within their jurisdiction to synchronise, consistent with industry standards, the

business clocks they use to record the date and time of any reportable event. Where they do so, business clocks should be synchronised to UTC.
Read more

The Working Group on Sterling Risk Free Reference Rates (RFRWG) on the transition away from LIBOR

On 16 January, the RFRWG published their Top Level Priorities for 2020, these being to (i) cease issuance of GBP LIBOR based cash products maturing beyond 2021 by the end of Q3 2020; (ii) take steps throughout 2020 to promote and enable widespread use of SONIA compounded in arrears; (iii) take steps to enable a further shift of volumes from GBP LIBOR to SONIA in derivative markets; (iv) establish a clear framework to manage transition of legacy LIBOR products, to significantly reduce the stock of GBP LIBOR referencing contracts by Q1 2021; and (v) provide market input on issues around “tough legacy”. The RFWG also published a statement on the progress on the transition of LIBOR-referencing legacy bonds to SONIA by way of consent solicitation. The RFRWG encourages all market participants to engage with the task of transitioning as many legacy bond contracts as possible. There are no mandatory terms of transition meaning that parties may agree on an appropriate arrangement. In the statement, the RFRWG published considerations for the conduct of consent solicitations to transition legacy bond contracts from LIBOR to SONIA. The RFRWG also published a factsheet on the phasing out of LIBOR. 2021 is the last year panel banks have agreed to participate in providing their submissions to LIBOR. Public authorities have been clear that LIBOR is expected to cease to exist after 2021. For loans, LIBOR products may not be offered beyond Q3 2020. All counterparties to a financial product or contract that references LIBOR will need to take action to remove any dependence on LIBOR that remains after 2021. SONIA cannot be directly substituted into existing contracts meaning that changes to systems need to be made in order to use it. The RFRWG also published a paper on use cases of benchmark rates, specifically on the use of SONIA by market participants. The paper highlights the preference of the RFRWG and UK authorities in adopting a broad-based transition to SONIA compounded in arrears for new transactions and provides further clarity on the potential usage of Term SONIA Reference Rates going forward.
RFRWG Top Level Priorities 2020
RFRWG Statement
RFRWG Factsheet
RFRWG Paper

FCA and BOE on transition away from LIBOR to SONIA

On 16 January, the FCA and BOE published a press release announcing next steps for LIBOR transition in 2020. The FCA and BOE support the objectives of the RFRWG set out in their Top Level Priorities for 2020 and provide a list of publications to assist with the transition away from LIBOR. The FCA also published a letter to Senior Managers of major banks and insurers in regard, supporting the RFRWG’s targets of (i) enabling a further shift of volumes from LIBOR to SONIA in derivative markets; (ii) ceasing issuance of cash products linked to sterling LIBOR by end-Q3 2020; and (iii) significantly reducing the stock of LIBOR referencing contracts by Q1 2021. The FCA and the PRA will step up engagement with firms on LIBOR transition. The BOE also updated its webpage which lists documents outlining priorities and milestones for 2020 on LIBOR transition. Buy-side market practitioners are invited to attend one of two roundtable events, on 24 and 31 January. Market participants with relevant expertise are invited to join three new task forces, focusing on (a) enablers to moving new loans issuance away from GBP LIBOR, (b) frameworks to support transition of legacy cash products, and (c) providing market input regarding the “tough legacy” of products that may prove unable to be converted or amended to include robust fallback. In their statement encouraging market makers to change the market convention for sterling interest rate swaps from LIBOR to SONIA, the FCA and BOE have set the date for the transition as 2 March.
BOE and FCA Press Release
FCA Letter
BOE Webpage
BOE and FCA Statement

ISDA FAQs on IBOR Fallback Rate Adjustments

On 13 January, ISDA published FAQs on IBOR Fallback Rate Adjustments. In the general overview, ISDA gives answers on (i) what an IBOR fallback is; (ii) which IBOR benchmarks are covered (iii) why there is a need for fallbacks if IBORs are still available; (iv) what permanent cessation triggers are; and (v) what a fallback adjustment is. ISDA also provides answers on Bloomberg’s role in the calculation of the new rate and what calculations they will be publishing. In regard to access to Fallback Adjustment Data, ISDA answer

(i) how this data will be made available; (ii) what it will cost to access the ISDA fallback rates; (iii) whether a license will be required for usage of Bloomberg calculated ISDA fallback rates and what use cases will be covered with this license; (iv) when the data can be accessed; and (v) at what times of the day the data will be published.
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PAYMENT SERVICES AND PAYMENT SYSTEMS

FCA update on Strong Customer Authentication (SCA) for electronic identification, authentication and trust services (eIDAS) certificates

On 16 January, the FCA updated its webpage on SCA under the Payment Services Directive. The update includes additional guidance on the use of eIDAS certificates. In its previous update in September 2019, the FCA introduced an adjustment period for certain circumstances, in which the FCA will not take enforcement action against firms if they do not implement the SCA, ending on 14 March. The updated webpage details that during the adjustment period, account servicing payment service providers (ASPSPs) are encouraged to allow third-party providers (TPPs) that do not yet have an eIDAS certificate and are accessing accounts via application programming interface standards (APIs), to enable the use of equivalent certificates enabling secure identification. All ASPSPs should tell TPPs which certificates they will accept during the adjustment period and the FCA encourage the use of the Open Banking Implementation Entity's transparency calendar for this. Following the adjustment period, the FCA expect all ASPSP and TPPs to rely on eIDAS certificates for the purpose of identification meaning that ASPSPs must ensure that their interface is capable of enabling a TPP to identify itself using only its eIDAS certificate. If TPPs agree voluntarily to it, ASPSPs can also enable TPPs to use a certificate obtained from a provider of an API programme, so long as that provider only issues the alternative identification certificate to a TPP that has enrolled with the API programme using its eIDAS certificate to identify itself.
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PRUDENTIAL REGULATION

EBA peer review report on the application of regulatory technical standards (RTS) on identifying material risk takers

On 16 January, the EBA published a peer review report on the application by competent authorities (CAs) of RTS which supplement the CRD IV Directive on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile. The peer review assesses the supervisory practices followed and measures taken by CAs with respect to the requirements of the RTS. This report highlights best practices in more detail, these being (i) CAs collecting information from institutions to ensure that the required information is all included in the documentation; (ii) institutions having a notification and prior approval process regarding exemptions for identified staff; (iii) the application of exemptions for individual staff is assessed; and (iv) the use of supervisory tools for assessing the institutions' compliance. CAs typically follow a risk-based approach. However, some CAs had some difficulties in distinguishing between their standard risk-based methods of supervision and the application of the proportionality principle, leading to diverging approaches with regard to the latter and in a few cases the exclusion of certain institutions from supervisory review on a systematic basis. With a view to improving the consistent application of the RTS and harmonising CAs' practices, the review panel suggested carrying out a targeted review of the application of the RTS.
Read more

EBA consultation on Draft Regulatory Technical Standards (RTS) on the treatment of non-trading book positions subject to foreign-exchange risk or commodity risk

On 13 January, the EBA published a consultation paper on draft Regulatory Technical Standards (RTS) on the treatment of non-trading book positions subject to foreign-exchange risk or commodity risk under Article 325(9) of the Capital Requirements Regulation (CRR) as amended by CRR2. The draft RTS specify (i) the value of non-trading book positions that institutions should be allowed to use where computing the own funds requirements for market risk for those positions; (ii) the treatment for non-monetary items held at historical cost that may be impaired due to changes in the relevant exchange rate; and (iii) a specific treatment with respect to the calculation of the actual and hypothetical changes for the purpose of the backtesting and the profit and loss attribution requirements to address the issue of jumps in the value of the portfolio. The deadline for comments and responses to be submitted is 10 April.
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SUSTAINABLE FINANCE

Proposal for a Regulation on the establishment of a framework to facilitate sustainable investment

On 16 January, European Union Committee of the House of Lords published a letter to the Economic Secretary to the Treasury on the establishment of a framework to facilitate sustainable investment. The Government's Green Finance Strategy noted that the UK would match the ambition of the EU's Sustainable Finance Action Plan. The letter raises questions, including (i) whether, post Brexit, the Government will seek to align with the secondary legislation which applies after 31 December; (ii) whether the government intends to clarify the position of nuclear energy in its taxonomy post-Brexit and what the implications such a decision would have for the government's aim of matching the EU's ambition; and (iii) whether the Economic Secretary is satisfied with the proposed composition of the new Platform on Sustainable Finance and whether it will allow the UK to maintain influence over the formulation of criteria after Brexit.
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TAXES/LEVIES

PRA and FCA consultation on 2020/21 Financial Services Compensation Scheme (FSCS) setting out proposals for the Management Expenses Levy Limit (MELL)

On 15 January, the PRA and FCA published a consultation paper on the FSCS, setting out proposals for MELL. The proposed MELL is £83.2 million for 2020/21, consisting of a management expenses budget of £78.2 million and an unlevied contingency reserve of £5 million. The proposed MELL would apply from Wednesday 1 April 2020, the start of the FSCS's financial year, to Wednesday 31 March 2021. The key points to note in the budget are set out, alongside further detail on the proposals and an explanation of the FSCS's contingency reserve. How the budget is allocated between PRA and FCA funding classes is also explained. The consultation closes on 17 February. On 16 January, the FSCS published their plan and budget for 2020/21 in which it explained that the proposed 2020/21 indicative levy is £635m, an increase of £87m from the levies raised in 2019/20 is mainly due to a rise in SIPP operator claims.
Consultation Paper
Budget 2020/21

FCA publish Fees (Cryptoasset Business) Instrument 2020

On 13 January, the FCA published the Fees (Cryptoasset Business) Instrument 2020 which came into force on 13 January. The instrument amends the Handbook by inserting the definition for cryptoasset business in the Glossary of definitions and amends the Fees manual (FEES), setting the fees payable by persons wishing to apply to the FCA to be registered as cryptoasset businesses. The fees are (i) £2,000 for businesses with UK cryptoassets revenue up to and including £250,000; and (ii) £10,000 for businesses with UK cryptoassets revenue over £250,000.
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OTHER DEVELOPMENTS

FCA regulation round-up for January

On 16 January, the FCA published its regulation round-up for January. Amongst other things, the FCA reminds firms of the need from 31 January to update or attest their Firm Details within 60 days of their Accounting Reference Date each year and the requirement to submit certified persons data by 9 March. The FCA also update on their Brexit implementation activities, namely that the Temporary Permissions Regime (TPR) notification window will close on 30 January as will the notification window for fund managers under the Temporary Marketing Permission Regime (TMPRR). The Government has not yet announced its plans for the period after 31 December. The FCA also provide an update on their MiFID Systems. The new Financial Instruments Reference Data System (FCA FIRDS) will continue to publish in parallel to ESMA's systems, but should only be used by firms for testing purposes. The FCA's version of ESMA's Financial Instruments Transparency Reference System (FCA FITRS) will be suspended until further notice and the FCA will resume it closer to the end of the implementation period. The FCA's update on Credit Rating Agencies (CRAs) clarifies that during the implementation period, EU law will continue to apply in the UK and ESMA will continue to operate as the direct supervisor of UK CRAs. For Trade Repositories (TRs) the FCA provide the update that ESMA will continue to operate as the direct supervisor of UK TRs and that the FCA's Trade Repository Derivatives Data Store (TRDDS) is now in operation. For CRAs and TRs, any new EU legislation that takes effect before the end of the implementation period will also apply to the UK.
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ESMA publishes questions received through its Q&A process

On 10 January, ESMA announced the publication of a list of questions received through its Q&A process. This is in the context of the entry into force of the revised ESMA Regulation including its new provisions applicable to Q&As which require ESMA to set up a web-based tool to facilitate the submission of questions

and the publication of questions received as well as answers to admissible questions. The new requirements will ensure additional interaction with stakeholders regarding Q&As, thus further strengthening and increasing supervisory convergence in the EU. ESMA is committed to implementing the web-based tool and is working on developing the necessary IT infrastructure which will be rolled-out on a phased basis during the course of the year. Pending the full implementation of the web-based tool, stakeholders can submit questions through the Q&A webpage of the ESMA website. ESMA has started publishing questions on its website in advance.
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