SHEARMAN & STERLING LLP

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP
NEWSLETTER

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# Financial Regulatory Developments Focus

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

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 Finalizes Rule Adjusting Maximum Civil Money Penalties

On January 18, 2017, the US Board of Governors of the Federal Reserve System finalized a rule increasing the maximum civil money penalty limits for 2017, as required by law. A civil money penalty is a fine imposed by a federal agency to penalize misconduct.

In November 2015, a law was passed that requires all federal agencies to adjust their maximum civil money penalty limits annually for inflation, rather than every four years as previously required. The maximum civil money penalty limits depend on several factors, including the severity and type of violation. Additionally, the law dictates the annual adjustment formula for federal agencies.

The new penalty amounts apply as of January 15, 2017.

The final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20170118a1.pdf.

### US Office of the Comptroller of the Currency Releases Semiannual Risk Report

On January 5, 2017, the US Office of the Comptroller of the Currency released its Semiannual Risk Perspective for Fall 2016, which highlights key risks facing national banks and federal savings associations. The report highlighted that strategic risk remains high as banks make changes to their business models and adopt innovative products. The OCC also noted that banks continue to ease underwriting practices to boost loan volume and to respond to competition from bank and nonbank lenders in commercial, commercial real estate and auto lending, according to the report. The credit risk associated with such practices is increasing due to increased risk layering, rising loan policy exceptions and weaker covenant protection. The report cited operational risk as another key risk, particularly cybersecurity threats, increased reliance on third-party relationships and the need for sound governance over sales practices. The report is based on data received from national banks and federal saving associations through June 30, 2016.

The report is available at: https://occ.gov/publications/publications-by-type/other-publications-reports/semiannual-risk-perspective/semiannual-risk-perspective-fall-2016.pdf.

### US Federal Banking Agencies Release Annual Community Reinvestment Act Asset-Size Threshold Adjustments for Small and Intermediate Small Institutions

On December 29, 2016, the US Federal Reserve Board, the OCC and the Federal Deposit Insurance Corporation announced the annual adjustment to the asset-size thresholds used to define small bank, small savings association, intermediate small bank and intermediate small savings association under the Community Reinvestment Act (CRA) regulations.

The annual adjustments are required by the CRA rules. Financial institutions are evaluated under different CRA examination procedures based upon their asset-size classification. Those meeting the small and intermediate small institution asset-size thresholds are not subject to the reporting requirements applicable to large banks and savings associations unless they choose to be evaluated as a large institution.

As a result of the adjustments, the definitions of small and intermediate small institutions for CRA examinations will change as follows:

(i) "Small bank" or "small savings association" means an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.226 billion.

(ii) "Intermediate small bank" or "intermediate small savings association" means a small institution with assets of at least $307 million as of December 31 of both of the prior two calendar years and less than $1.226 billion as of December 31 of either of the prior two calendar years.

These asset-size threshold adjustments are effective upon publication in the Federal Register.

The joint final rule is available at: https://www.fdic.gov/news/news/press/2016/pr16111a.pdf.

### US Federal Reserve Board Releases Global Indicator Amounts for G-SIB Surcharge Calculation

On December 28, 2016, the US Federal Reserve published the aggregate global indicator amounts for the purposes of calculating the "Method 1" G-SIB Surcharge for 2016. The Federal Reserve Board's G-SIB surcharge rule establishes a methodology to identify global systemically important bank holding companies in the United States based on certain indicators that are correlated with systemic importance. Under the G-SIB surcharge rule, a firm must calculate its G-SIB score using a specific formula ("Method 1").

The aggregate global indicator amounts used in the score calculation under Method 1 are based on data collected by the Basel Committee on Banking Supervision. The indicators provided by the Basel Committee were converted to US dollars using a euro-dollar exchange rate of 1.0887, which was the daily euro to US dollar spot rate on December 31, 2015.

The global indicator amounts for 2016 have decreased from the 2015 values, except for the "[u]nderwritten transactions in debt and equity markets" indicator under Substitutability, for which there was a slight increase.

The Federal Register notice is available at: https://www.gpo.gov/fdsys/pkg/FR-2016-12-28/pdf/2016-31371.pdf.

### US Office of the Comptroller of the Currency Finalizes Rule Prohibiting Banks from Dealing and Investing in Metals

On December 28, 2016, the OCC issued a final rule, 12 C.F.R. § 7.1022, that prohibits national banks and federal savings associations (FSAs) from dealing or investing in industrial or commercial metals.

The final rule covers metal, including alloy, in a physical form primarily suited to industrial or commercial uses, such as copper cathodes and aluminum T-bars. The final rule supersedes a prior OCC determination permitting national banks to trade copper. The rule, however, still recognizes that national banks and FSAs may hold industrial or commercial metal under authorities that are distinct from dealing and investing. For example, national banks and FSAs may acquire industrial or commercial metal through foreclosures on loans and then sell the metal to mitigate loan losses.

The rule carries out an OCC recommendation included in its report to Congress and the Financial Stability Oversight Council under section 620 of the Dodd-Frank Act. Section 620 required the federal banking agencies to conduct a study of the activities and investments that banking entities may engage in under state and federal law and to consider the associated risks and how banking entities mitigate those risks.

The effective date of the final rule is April 1, 2017. Banks with existing holdings of industrial and commercial metal acquired through dealing or investing activities must divest of such metal as soon as reasonably practical, but no later than one year after the effective date of the final rule, subject to four one-year extensions available from the OCC in particular cases.

The final rule is available at: https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-161a.pdf.

### The US Federal Deposit Insurance Corporation Releases a New Handbook for De Novo Institutions Applying for Deposit Insurance

On December 22, 2016, the FDIC released a handbook, developed to facilitate the process of establishing new banks, by offering guidance for navigating the phases of establishing an insured institution. The handbook, titled "Applying for Deposit Insurance—A Handbook for Organizers of De Novo Institutions," is part of recent efforts by the FDIC to increase transparency and clarity regarding the deposit insurance application process. The standards in the Handbook relax certain requirements that had been imposed as a result of the financial crisis. Comments on the handbook are due February 20, 2017.

The handbook is available at: https://www.fdic.gov/regulations/applications/handbook.pdf.

### US Federal Banking Agencies Issue FAQs Regarding Implementing New Accounting Standards for Credit Losses

On December 19, 2016, the US Federal Reserve, the FDIC, the US National Credit Union Administration and the OCC issued FAQs to assist institutions in implementing the new accounting standard for credit losses, which was recently issued by the US Financial Accounting Standards Board. The new standard, "Financial Instruments—Credit Losses," replaces the existing incurred loss methodology in US GAAP and establishes the new current expected credit losses methodology (CECL). The FAQs expand on the "Joint Statement on the New Accounting Standard on Financial Instruments—Credit Losses," which the agencies issued in June 2016. The agencies plan to continue issuing FAQs regarding the implementation of the CECL methodology.

The notice to the banks is available at: https://www.federalreserve.gov/bankinforeg/srletters/sr1619.htm and the FAQs are available at: https://www.federalreserve.gov/bankinforeg/srletters/sr1619a1.pdf.

### The US Board of Governors of the Federal Reserve System Approves Rule Requiring Liquidity Coverage Ratio Disclosure

On December 19, 2016, the US Federal Reserve Board approved a final rule requiring large (generally defined as consolidated assets of $50 billion or more) depository institution holding companies, and certain nonbank financial companies supervised by the Federal Reserve, to publicly disclose their liquidity coverage ratio. The final rule requires these covered financial institutions to publicly disclose quantitative and qualitative information regarding their liquidity coverage ratio calculation on a quarterly basis. The disclosures must be made in a direct and prominent manner on the company's public internet site or in a public financial or other public regulatory report and must remain available for five years. The Federal Reserve stated that requiring institutions to report their medium-term liquidity position would provide "a better indication of the overall strengths and weaknesses of a company's liquidity position" rather than an examination of short-term swings in a company's liquidity position. The final rule is similar to the rule proposed in November 2015; however, the rule as adopted extends the implementation timeline of the public disclosure requirements by nine months. Under the new rule, covered companies, which include those that have $700 billion or more in total consolidated assets or those that have $10 trillion or more in assets under custody, will need to start complying with the public disclosure requirements beginning on April 1, 2017. Other covered companies will be required to comply with the public disclosure requirements beginning on April 1, 2018.

The text of the final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161219a1.pdf.

### US Office of the Comptroller of the Currency Issues Rules to Reduce Regulatory Burden

On December 15, 2016, the US Office of the Comptroller of the Currency released a final rule to remove outdated or unnecessary provisions of certain rules to reduce regulatory burden. The rule is a result of the OCC's decennial review of its rules required by the US Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) of 1996. While the OCC is conducting the EGRPRA review jointly with the other federal financial regulatory agencies, the final rule addresses regulations that are exclusive to the OCC. Of note, the final rule: removes notice and approval requirements for certain changes in permanent capital involving national banks; clarifies national bank director oath requirements; removes certain financial disclosure requirements for national banks; integrates and updates OCC rules for national banks and federal savings associations relating to municipal securities dealers, Securities Exchange Act of 1934 disclosures, securities offering disclosures and insider and affiliate transactions; updates recordkeeping and confirmation requirements for national banks' and federal savings associations' securities transactions; and permits the electronic submission of filings required under the Securities Act of 1933 and the Securities Exchange Act. The OCC has also recommended legislative chances that would remove unnecessary burden for national banks and federal saving associations.

The final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/20161213a.htm.

### US Board of Governors of the Federal Reserve System Approves Final TLAC Rule

On December 15, 2016, the US Federal Reserve Board issued a final rule establishing total loss absorbing capacity (TLAC) long-term debt (LTD), clean holding company requirements and regulatory capital deductions for US global systemically important banks (G-SIBs) and the US intermediate holding companies of non-US G-SIBs. While the final TLAC rule is largely consistent with the Federal Reserve Board's proposed rule issued in October 2015, the Federal Reserve Board made certain adjustments in the final rule in response to comments received. Notably, the Final Rule: (1) lowered certain of the TLAC and LTD requirements; (2) allows certain US intermediate holding companies to issue external LTD rather than require all such LTD to be issued to the foreign parent company or affiliate; (3) allows for the grandfathering of certain long-term debt including debt that was issued prior to December 31, 2016 and contained acceleration clauses or was governed by foreign law; and (4) removed the phase-in periods provided for under the proposed rule. Institutions that meet the relevant thresholds under the final rule would be required to comply with the requirements by January 1, 2019.

The final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161215a1.pdf.

### European Banking Authority Adopts Procedure for Investigating Breach of EU Law by National Regulators

On January 11, 2017, the European Banking Authority published a Decision of the Board of Supervisors of the EBA, dated December 23, 2016, adopting Rules of Procedure for the investigation of a breach of EU law. The Regulation establishing the EBA gives the EBA the power to investigate an alleged failure by a national regulator to apply the requirements of the Capital Requirements Regulation or the Capital Requirements Directive or their application in a way which appears to be a breach of EU law. The Decision sets out factors, criteria and other related matters that the EBA will take into account when it receives a request from a third party to initiate an investigation or to EBA own initiative investigations.

The Decision is available at:
https://www.eba.europa.eu/documents/10180/1712606/EBA+DC+174+%28Decision+on+adopting+Rules+of+Procedures+for+Investigation+of+Breach+of+Union+Law%29.pdf/404eb483-e1ec-4b56-9e31-e59881384 55d.

### European Banking Authority Updates the Recommendations on Equivalence of Confidentiality Regimes

On January 11, 2017, the EBA published an updated recommendation on the equivalence of the confidentiality regimes of third country supervisory authorities. CRD provides that third country supervisory authorities may participate in a college of supervisors set up for an international cross-border bank if: (i) it is considered appropriate for that authority to participate; and (ii) the authority is subject to confidentiality requirements that are equivalent to those set out in the CRD. The EBA's recommendations only relate to the equivalence of the confidentiality regimes. The appropriateness issue is to be determined by each college of supervisors.

In April 2015, the EBA recommended that the confidentiality regimes of the supervisory authorities in the following countries should be considered as equivalent to the CRD IV requirements: Bosnia-Herzegovina, Brazil, Canada, China, FYR Macedonia, Mexico, Montenegro, Serbia, Singapore, Switzerland, Turkey and the US. Those recommendations applied from April 2, 2015. The EBA updated the recommendations to include Albania from September 12, 2015.

The EBA has updated the recommendations again adding Australia, Hong Kong, Japan and Kosovo. The latest recommendations applied from January 12, 2017.

The updated recommendations are available at: http://www.eba.europa.eu/documents/10180/1712871/EBA-Rec-2017-01+Recommendation+amending+EBA-Rec-2015-02.pdf.

### European Banking Authority Publishes Translation of its Guidelines on Corrections to Duration for Debt Instruments

On January 4, 2017, the EBA published translations of the final Guidelines on the correction required for the calculation of Modified Duration for debt instruments subject to prepayment risk under the CRR. The Guidelines will apply from March 1, 2017.

The CRR establishes two methods to calculate capital requirements for general interest rate risk. The relevant methods are the Maturity-Based calculation and the Duration-Based calculation of general risk. The final Guidelines apply to the

Duration-Based calculation. The Duration-Based calculation uses the concept of Modified Duration pursuant to the formula outlined in the CRR. This method is only valid for instruments that are not subject to prepayment risk. The EBA is mandated to issue guidelines establishing how to correct the Modified Duration calculation to reflect prepayment risk. The EBA Guidelines propose two approaches to correct the calculation. One option is to treat the debt instrument with prepayment risk as if it is a combination of a plain vanilla bond and an embedded option. The Modified Duration of the plain vanilla bond is therefore corrected with the change in value of the embedded option, which is estimated according to its theoretical delta, resulting from a 100 basis point movement in interest rates. The other option is to directly calculate the change in value of the whole instrument subject to the prepayment risk resulting from a 100 basis point movement in interest rates.

The Guidelines are available at: https://www.eba.europa.eu/documents/10180/1707146/Guidelines+on+corrections+to+modified+duration+%28EBA-GL-2016-09%29_EN.pdf/47a08343-6c4d-40f8-9ed5-c7a805738f37.

### European Banking Authority Requests Extension for Delivery of Draft Technical Standards under EU Capital Requirements Legislation

On January 3, 2017, the EBA published a letter, dated December 23, 2016, in which it requests an extension of time from the European Commission for delivering certain draft technical standards which were due to be delivered by December 31, 2016 under the CRR and the CRD. The EBA is requesting an extension for the Regulatory Technical Standards and the Implementing Technical Standards on the authorization of banks because of a combination of its significant workload and considerable resource constraints and issues arising in respect of new entrants and FinTech companies in addition to the need to achieve a balance between allowing Member States to retain their own authorization processes while harmonizing the information required. The EBA expects to be able to deliver the ITS and RTS by mid-2017.

The EBA is also requesting an extension for the RTS on consolidation methods which it has experienced difficulties with because of the interactions with the Basel framework and with the European Commission's recent adoption of legislation to amend the CRR. The EBA expects to be able to finalize the draft RTS by the end of 2017.

The RTS on the exclusion of transactions with non-financial counterparties established in third countries and the RTS on the disclosure of encumbered and unencumbered assets have been subject to delay because of the EBA prioritizing its work in response to the Commission's Call for Evidence for its legislative proposals to amend the CRD and CRR. The EBA expects to finalize both RTS in Q1 2017.

In addition, the letter addresses some of the other remaining mandates given to the EBA under the CRD and CRR, which the EBA has reprioritized due to a lack of resources and in light of EU and international developments, such as the RTS on the combined use of different approaches in the operational risk area.

The letter is available at: https://www.eba.europa.eu/documents/10180/1705656/Letter+to+O+Guersent%2C%20re+Request+for+revised+deadlines+in+the+CRR+for+the+delivery+of+draft+technical+standards.pdf/7033dc3c-5141-4b39-b214-35dfea5a4001.

### European Banking Authority Reports on Cyclicality of EU Capital Requirements Framework

On December 22, 2016, the EBA published a report on the cyclicality of banks' capital requirements. The report examines whether the EU's risk-sensitive capital requirements create unintended pro-cyclical effects and whether any remedial steps are necessary or justified. The EU's capital requirements framework is set out in the CRR and CRD, together known as CRD IV. The CRR requires the European Commission to prepare a biennial report for the European Parliament and the Council of the European Union on the issue. This report from the EBA is intended to feed into that report.

The EBA concludes that the impact of the EU capital requirements framework on the EU economic cycle is limited and that there are no strong reasons for shifting from the risk-sensitive framework. The EBA notes that EU banking legislation provides tools for regulators to respond to any pro-cyclicality concerns, as appropriate, and recommends periodic monitoring of the potentially cyclical impact of the EU bank regulatory framework (not only regulatory capital) and further research into the effectiveness and efficiency of counter-cyclical instruments.

The EBA's report is available at: http://www.eba.europa.eu/documents/10180/1701905/Report+on+the+Cyclicality+of+Capital+Requirements+%28EBA-Op-2016-24%29.pdf.

### European Banking Authority's Third Report on Impact of the Liquidity Coverage Ratio

On December 21, 2016, the EBA published its third impact assessment report for the liquidity coverage ratio requirements under CRD IV. CRR mandates the EBA to prepare the LCR impact assessment report annually. The aim of the report is to assess the impact of the EU's LCR regulation on the EU banking sector. The report indicates a constant improvement of the average LCR across EU banks since 2011. In addition, it states that the average LCR for EU banks at the end of December 2015 was approximately 134%, with an aggregate gross shortfall of EUR 10.9 billion. This increase has been attributed to an increase in liquid assets.

The EBA is also required to report to the European Commission on whether the EU's timeframe should be amended to fit with the Basel III timeline. The report reviews the phasing-in of the liquidity coverage requirements, in particular, assessing whether there is a case for deferring the introduction of the 100% minimum binding standard from January 1, 2018 until January 1, 2019. Under the CRR and related secondary legislation, the EU LCR minimum requirement was set at 60% from October 1, 2015 and is gradually increasing to 100% in January 2018, a year ahead of the Basel implementation date. The EBA concludes that there is no significant evidence to recommend amending the current transitional framework because the existing level of non-compliance with the LCR under full implementation is low.

The report is available at: http://www.eba.europa.eu/documents/10180/1700800/EBA+report+on+liquidity+measures+and+the+review+of+the+phase-in+of+the+liquidity+coverage+requirement+%28EBA-Op-2016-22%29.pdf.

### EU Equivalence Decision on Recognized Third Countries for Treatment of Exposures of Banks

On December 21, 2016, a Commission Implementing Decision was published in the Official Journal of the European Union, updating the list of third countries with equivalent regulatory arrangements in relation to prudential requirements for banks and investment firms for the purpose of the treatment of exposures. The Decision lists the countries whose arrangements for supervision and regulation of banks and investment firms are deemed by the European Commission to be equivalent to the standards of the EU as set out in the CRR. The Decision is based on assessments that reviewed the supervisory and regulatory arrangements in each country for: (i) banks; (ii) investment firms; and (iii) exchanges. The following nations and territories are now equivalent across categories (i) and (ii): Turkey, New Zealand, the Faroe Islands and Greenland. This Decision entered into force on January 10, 2017.

The list of equivalent third countries and territories is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2358&from=EN.

### European Banking Authority Proposals for Designation and Supervision of Significant-Plus Branches

On December 20, 2016, the EBA published for consultation draft Guidelines on supervision of significant branches. The proposed Guidelines set out how the consolidating supervisor, the home supervisor and the host supervisor should cooperate to prudentially supervise and coordinate monitoring of significant branches requiring intensified supervision. An "intensification test" is proposed to assess which branches should be designated as significant-plus branches. Significant-plus branches will be those that are assessed as important for the firm or the group or as performing critical functions or as important for the financial stability of the host Member State. A branch that is assessed to be a significant-plus branch would be subject to intensified supervision which would entail, amongst other things, a separate branch risk assessment, regular on-the-spot checks and inspections, extensive sharing of supervisory intelligence, coordinated application of supervisory and precautionary measures and reflection of the branch in the firm's recovery planning. The consultation closes on March 20, 2017.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/1699755/Consultation+Paper+on+Guidelines+on+supervision+of+significant+branches+%28EBA-CP-2016-24%29.pdf.

### European Banking Authority Recommendations for the EU Covered Bonds Framework

On December 20, 2016, the EBA published recommendations for harmonizing the EU framework for covered bonds. For banks investing in covered bonds that meet certain criteria, the CRR sets preferential risk weights to be applied. The recommendations are set out in a report which builds on the EBA's 2014 Report on EU covered bond frameworks and capital treatment. The aim of the recommendations is to ensure that only financial instruments which comply with certain harmonized structural, credit risk and prudential standards are capable of being covered bonds, and as such have access to the special regulatory and capital treatment provided. Harmonizing the EU framework on covered bonds is part of the Capital Markets Union initiative launched by the European Commission in September 2015.

The EBA is proposing a three step approach. The first step would entail the introduction of an EU covered bond directive which would apply across different financial sectors and be based on the minimum harmonization principle. The directive would define the "covered bond" as an instrument recognized by EU financial regulation and would include requirements on: (i) the dual recourse of a covered bond, segregation of cover assets and bankruptcy remoteness of a covered bond; (ii) the coverage principle, liquidity risk mitigation and cover pool derivatives; (iii) a system of special public supervision and administration; (iv) transparency and disclosure; and (v) the additional conditions for the soft bullet and conditional pass through structures to meet in order to qualify as covered bonds.

The enhancement of the conditions set out in the CRR for preferential risk weight treatment of banks' investments in covered bonds would be the second step. This would include assessing the existing conditions on the eligibility of covered assets (which the EBA recommends should not be widened) and loan-to-value (LTV) limits for mortgage cover pools as well as establishing limits on substitution assets and requirements on overcollateralization.

The third step would involve specific areas of the covered bond business becoming subject to voluntary convergence such as composition of the cover pools, requirements for cover pools with underlying assets/obligors located in jurisdictions outside the European Economic Area, LTV measurement and frequency of revaluation, and stress testing by the covered bond issuer. This would be attained through non-binding instruments, and the recommendations would not have an impact on the eligibility of the covered bonds for the preferential regulatory and risk weight treatment.

The report is available at: http://www.eba.europa.eu/documents/10180/1699643/EBA+Report+on+Covered+Bonds+%28EBA-Op-2016-23%29.pdf.

### European Supervisory Authorities Finalize Guidelines for the Prudential Assessment of Acquisitions and Qualifying Holdings

On December 20, 2016, the Joint Committee of the European Supervisory Authorities published a report outlining final joint Guidelines for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector. The Joint Committee consists of the EBA, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority. The final Guidelines follow a consultation on draft guidelines published on July 3, 2015, and will replace previous guidelines published by the ESAs' predecessors in 2008.

The purpose of the final Guidelines is to provide legal certainty and clarity on assessment processes relating to increases of control and acquisitions of banks, investment firms and insurance firms, bringing a more harmonized, clear and transparent process to prudential assessments by national regulators. In addition, the final Guidelines seek to provide clearer details on what information is required from proposed acquirers. The guidelines cover questions related to: (i) indirect acquisitions of qualifying holdings, persons acting in concert and decisions to acquire; (ii) assessment periods; and (iii) financial soundness of acquirers. The report summarizes the main points and comments that were raised in the twelve responses to its Consultation.

Once translated into the official languages of the European Union and published on the websites of the ESAs, regulators must report within two months of publication whether they can comply with the Guidelines. The Guidelines will apply from October 1, 2017.

The final Guidelines are available at: https://esas-joint-committee.europa.eu/Publications/Guidelines/JC%20GL%202016%2001%20(Joint%20Guidelines%20on%20prudential%20assessment%20of%20acquisitions%20and%20increases%20of%20qualifying%20holdings%20-%20Final).pdf.

### Review and 2017 Recommendations on Dividends and Variable Remuneration

On December 15, 2016, the European Central Bank published the outcome of its second Supervisory Review and Evaluation Process in 2016 and updated Recommendations on dividend distribution and remuneration policies for 2017. The ECB comments that SREP outcomes reveal a broadly stable capital demand for 2017 and that any changes in individual bank levels reflect changes in individual bank risk profiles. The aggregate capital demand by directly supervised banks for 2017 is comparable to that of 2016, with an average of around 10% Common Equity Tier 1. The ECB also imposed liquidity measures that require banks to have higher LCRs than the regulatory minimum.

The updated ECB Recommendations on dividend distribution and remuneration policies are to be adopted in 2017, for the financial year 2016. The ECB has maintained its general stance on both topics while accounting for regulatory change on the obligation of the supervisor to differentiate between the types of Pillar 2 capital that a bank is required to hold.

The press release is available at: https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr161215.en.html and the recommendations are available at: https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2016/dividend_distribution_2016.en.pdf?83c005cff616993b65529396bc811c02.

### Final EU Guidelines on Pillar 3 Regulatory Disclosure Requirements

On December 14, 2016, the EBA published final Guidelines on compliance with the regulatory disclosure requirements in the CRR. The EBA's Guidelines aim to ensure harmonized implementation of the Basel III Pillar 3 requirements that were released in January 2015. The Guidelines introduce specific guidance and formats for Pillar 3 disclosures, including tables and templates. The Guidelines will apply to Globally and Other Systemically Important Institutions. However, national regulators are able to require other firms to apply the Guidelines when complying with their Pillar 3 disclosure obligations under the CRR. The Guidelines apply for year-end 2017 disclosures. However, the EBA recommends that G-SIIs implement these for year-end 2016 disclosures, and strongly encourages implementation of the guidelines for a limited subset of disclosure requirements relating to risk-weighted assets and capital requirements for the year-end 2016 disclosures.

The final Guidelines are available at: http://www.eba.europa.eu/documents/10180/1696202/Final+report+on+the+Guidelines+on+disclosure+requirements+under+Part+Eight+of+Regulation+575+2013+%28EBA-GL-2016-11%29.pdf.

### European Commission Reports on Diversity of Bank and Investment Firm Management Bodies

On December 8, 2016, the European Commission published a report on benchmarking of diversity practices under CRD. The CRD requires banks and investment firms to ensure that the composition of management bodies is sufficiently diverse in terms of age, gender, geographical provenance, education and professional background. Firms are required to put in place a policy promoting management body diversity and to publish the report, the firm's objectives, relevant targets (if any) and the extent to which these have been met. The Commission is required to report to the European Parliament and the Council of the European Union on the results achieved as a result of the requirements of CRD and on the appropriateness of benchmarking diversity practices. The Commission found that improvements could still be made, both for having a policy in place and achieving greater diversity, and highlighted the need for firms and supervisors to take steps to ensure that the policies are put in place. In addition, the Commission concluded that the benchmarking of diversity practices is a useful tool for assessing the impact and effectiveness of the CRD requirements over time and to monitor for compliance. The Commission does not consider that any legislative amendments are required at this time.

The report is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-774-F1-EN-MAIN.PDF.

### Final EU Guidelines on Implicit Support for Securitization Transactions

On November 24, 2016, the EBA published translations of the final Guidelines on implicit support for securitization transactions under the CRR. The substantive content of the Guidelines is unchanged since the final Guidelines were published in August 2016. The publication of the translations triggers the application of the Guidelines which will apply from March 1, 2017.

Examples of relevant transactions include purchases of deteriorating credit risk exposures from an underlying pool or improvement of quality of credit enhancements through the addition of higher quality risk exposures. The CRR places restrictions on providing implicit support to securitizations. These rules apply in addition to the so-called "skin in the game" requirements on originators to retain part of the risk on securitizations. To prevent uncapitalized risks of implicit support, the CRR requires that any reduction in capital requirements gained through a securitization must be justified by a corresponding transfer of risk to third parties. The CRR also states that a transaction is not considered to provide support to a securitization if it is executed under arm's length conditions and taken into account in the assessment of significant risk transfer. The CRR requires a sponsor or originator institution that has failed to comply with this requirement to, at a minimum, hold own funds against all of the securitized exposures as if they had not been securitized.

The Guidelines set out an objective test in relation to the definition of arm's length conditions. A transaction will be considered to be executed on arm's length terms where the terms of the transaction are such as they would be used in a normal commercial transaction if the parties had no relationship with each other, and each party acted independently, entered into the transaction of its own volition, acted in its own interests and did not enter into the transaction on the basis of extraneous considerations. The Guidelines also set out conditions in relation to the assessment of significant risk transfer and the relevant factors that will be taken into consideration.

National regulators must notify the EBA as to whether they comply, intend to comply or do not intend to comply with the guidelines by January 24, 2017.

The Guidelines are available: http://www.eba.europa.eu/regulation-and-policy/securitisation-and-covered-bonds/guidelines-on-implicit-support-for-securitisation-transactions.

### European Banking Authority Launches Second Impact Assessment on Implementation of IFRS 9

On November 24, 2016, the EBA announced the launch of a second impact assessment on the implementation of International Financial Reporting Standard 9. The second impact assessment builds on the findings in the first impact assessment that was published by the EBA in a report on November 10, 2016. The Report analyzes the estimated impact of implementing IFRS 9 on firms and their regulatory capital and assesses the interaction between IFRS 9 and other prudential requirements. The implementation efforts by firms (such as the development of processes, systems and models) are ongoing and the EBA expects that implementation measures will continue to evolve until at least the initial application of IFRS 9 on January 1, 2018. The EBA highlights that smaller banks are lagging in preparation compared to larger banks and notes that firms should not underestimate the work required to implement IFRS 9.

The second impact assessment will include questions focused on specific aspects around the main topics and findings from the first impact assessment. The EBA expects more detailed and accurate information from banks relating to their implementation of IFRS 9 than the previous assessment, as the information previously given reflected that banks were at an early stage of implementation.

The second assessment is one of several steps that were proposed in the Report to assist in monitoring the implementation of IFRS 9. The EBA also proposed ongoing dialogue on the implementation issues outlined in the Report through engagement with the EBA, firms and auditors and considering additional regulatory guidance on the interaction between existing prudential requirements and the applicable accounting framework. This includes any guidance on transitional arrangements for the application of revised accounting frameworks and clarifications regarding the current RTS for specifying specific credit risk adjustments and general credit risk adjustments.

The Report is available at:
http://www.eba.europa.eu/documents/10180/1360107/EBA+Report+on+impact+assessment+of+IFRS9.

### Delay to Finalizing Basel III

On January 3, 2017, the Basel Committee announced that it had, along with the Group of Central Bank Governors and Heads of Supervision, made progress towards completing the Basel Committee's post-crisis regulatory reforms, known as Basel III. However, despite the progress, more time is needed to finalize some areas, including the final calibration, before those proposals can be reviewed by the GHOS. This impacts the meeting of the GHOS which had been scheduled for early January, which has been postponed accordingly. The Basel Committee gave no specific date as to when the work would be completed, saying only that it expects to complete the work in the near future.

The press release is available at: http://www.bis.org/press/p170103.htm.

## Consumer Protection

### UK Regulators Consult on the Management Expenses Levy Limit for 2017/18

On January 16, 2017, the Prudential Regulation Authority and the Financial Conduct Authority published a joint consultation paper on the management expenses levy limit for the Financial Services Compensation Scheme in 2017/2018. The MELL proposed for 2017/18 is £74.54 million. The FSCS is a last resort compensation fund for consumers of failed authorized financial services firms that fall under the regulatory remit of the FCA and PRA. The MELL is the maximum amount which the FSCS may levy in a year without further consultation. The proposed MELL of £74.54 million consists of £69.24 million for FSCS management of expenses and £5.3 million as an unlevied contingency reserve. The consultation also contains the proposed rules for the PRA and FCA to set the MELL in 2017/18. Responses to the MELL for 2017/18 as outlined in the consultation are due by February 13, 2017. The PRA and FCA aim to finalize and publish the rules in a policy statement to be published in March 2017 and final rules are expected to take effect from April 1, 2017 with invoices to be sent out to firms from July 2017.

The consultation paper is available at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2017/cp117.pdf.

### UK Prudential Regulator Confirms Increase in Deposit Protection Limit

On January 16, 2017, the PRA published a Policy Statement and final rules on raising the deposit protection limit. The Policy Statement follows the consultation paper published by the PRA in November 2016. It is proposed that the DPL will be raised to £85,000 from January 30, 2017. The Policy Statement provides feedback to the responses received to the consultation paper. The PRA received 24 responses, with most respondents supportive of the proposals to reset the DPL at £85,000. The purpose of the revised DPL is to provide depositors with PRA-authorized firms commensurate protection to that of depositors with firms authorized by regulators in other EU Member States. The Deposit Guarantee Schemes Directive requires non-Euro Member States to adjust their deposit protection limits every five years to ensure they are equivalent to the euro limit of EUR100,000 (£85,000 was added as a figure following recent currency fluctuations).

The DPL is effective from January 30, 2017. Firms will need to make changes to customer-facing materials required to implement the new deposit limit as soon as practicable from January 30, 2017, and at the latest, by June 30, 2017. The PRA expected firms to train their customer-facing staff to answer questions from customers about the change in the deposit limit, regardless of whether a firm's written materials are amended by January 30, 2017.

The Policy Statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2017/ps117.pdf and the final rules are available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2017/ps117app1.pdf.

### UK Financial Conduct Authority Proposes Changes to Financial Services Compensation Scheme Levies and Rules

On December 14, 2016, the FCA launched a consultation on the future funding of the FSCS as well as changes to the FSCS rules. The FSCS is the compensation scheme for customers of UK authorized financial services firms. It covers the business conducted by firms authorized by the FCA and the PRA and protects, subject to certain limits, deposits, investment business, home finance, insurance policies and insurance broking. The FSCS is funded by contributions from firms across the financial services sector. The FCA's consultation follows the Financial Advice Market Review, conducted by HM Treasury and the FCA, which concluded that the scale and impact of FSCS levies has increased sharply for certain firms recently, particularly those required to contribute towards claims for self-invested personal pensions. This causes concerns relating to the unpredictability of levies and, in some sectors, a relatively small number of firms being responsible for a large proportion of compensation claims.

The FCA is carrying out a fundamental review of the FSCS level and the protection that it provides to consumers. In particular, the FCA is consulting on (i) whether more comprehensive professional indemnity insurance could increase the proportion and value of claims covered by insurance when firms fail; (ii) introducing product provider contributions towards the cost of claims against intermediary firms to reflect the wider responsibilities of product providers in the process; (iii) changing the FSCS funding classes for types of intermediation activities, including alternative class structures; (iv) whether risk-based levies could better reflect the risks of specific practices, particularly for firms distributing higher risk products; (v) updating compensation limits as a result of pension freedoms; (vi) extending FSCS coverage for some aspects of fund management and introducing it for debt management and structured deposit intermediation; (vii) imposing reporting requirements so that more risk-based levies can be introduced in the future; (viii) requiring Lloyd's of London to contribute to the retail pool if costs in an intermediary funding class breached affordability thresholds; and (ix) requiring certain firms to pay a proportion of the levy on account.

The consultation closes on March 31, 2017. The FCA will publish some final rules later this year but will also consult further on some of the issues raised in its consultation paper.

The consultation paper is available at: https://www.fca.org.uk/publication/consultation/cp16-42.pdf.

### UK Regulator Proposals to Amend the Conduct of Business Rules for Retail CfDs

On December 6, 2016, the FCA published a consultation paper setting out its proposals to enhance the conduct of business rules for firms providing contract for difference products to retail clients and to limit the risks of CfDs for retail clients. The FCA is proposing to change its current rules because of increasing evidence of poor conduct by relevant firms and risks posed to retail customers. Amongst other things, the FCA is proposing to require all CfD firms to provide a standardized risk warning and mandatory profit-loss disclosures, to impose lower leverage limits for inexperienced retail clients (i.e. those with less than 12 months of active trading experience) and higher leverage limits for experienced retail clients, and to prohibit bonus and account opening promotions for their retail CfD products and platforms.

The FCA also sets out its policy proposals for the regulation of binary bets. Binary bets are expected to be brought within the UK regulatory perimeter as part of the UK implementation of the revised Markets in Financial Instruments Directive. The FCA is considering its policy approach for the protection of retail clients in relation to binary bets and is seeking feedback on its approach before it consults on formal proposals.

The consultation closes on March 7, 2017. The FCA expects to publish a Policy Statement and final rules in Q2 2017, with the expectation that the rules will come into force shortly afterwards.

The consultation paper is available at: https://www.fca.org.uk/publication/consultation/cp16-40.pdf.

## Credit Ratings

### European Supervisory Authorities Publish Good Practices to Reduce Mechanistic Reliance on Credit Ratings

On December 20, 2016, the Joint Committee of the ESAs published a final Report containing Good Supervisory Practices for reducing sole and mechanistic reliance on credit ratings. The purpose of the Report is to reduce the sole and mechanistic reliance on credit ratings, in accordance with requirements set out in legislation such as the Credit Rating Agencies Regulation, and to ensure a level of cross-sectoral consistency in the implementation of certain elements of the CRR. The ESAs have produced the report to assist regulators supervising entities such as banks, investment firms, insurance and reinsurance undertakings and investment companies. In particular, the Report seeks to clarify regulators' responsibilities for monitoring the adequacy of their supervised entities' credit risk assessment processes, assessing the use of contractual references to credit ratings and encouraging them to mitigate the impact of any such references. The Report provides an overview of how regulators may approach their supervisory responsibilities under the CRA legislative package.

The Report contains two sets of common good practices. In the first, the ESAs propose a general framework for the monitoring of the use of credit ratings and the treatment of references to credit ratings in credit assessments. They also suggest potential alternatives or complementary measures to ratings and also how to address issues of proportionality arising from the varying scale and complexity of supervised entities. In the second set, there are specific practices to establish a common approach for supervision of how credit ratings are used across specific business processes, in particular, where credit ratings are most in danger of being used in a mechanistic way.

The Report is available at: https://esas-joint-committee.europa.eu/Publications/Reports/JC%202016%2071%20Final%20Report%20Good%20Supervisory%20Practices%20for%20Reducing%20Mechanistic%20Reliance%20on%20Credit%20Ratings.pdf.

### European Rating Platform Launched

On December 1, 2016, ESMA announced the launch of a new database, the European Rating Platform. The ERP provides access to free, up-to-date information on credit ratings that have been issued by a credit rating agency that is registered or certified by ESMA, except for those issued under the investor-pays model. The ERP enables investors and other users of ratings to compare all credit ratings that exist for a specific rated entity or instrument. It holds rating history details from July 1, 2015 onwards, press releases accompanying the rating issuances and research reports for sovereign ratings.

ESMA's announcement is available at: https://www.esma.europa.eu/press-news/esma-news/esma-provide-free-credit-ratings-information-public; the ERP is available at: https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_radar.

## Cyber Security

### Federal Banking Agencies Extend Comment Period for Advance Notice of Proposed Rulemaking on Enhanced Cyber Risk Management Standards

On January 13, 2017, the Federal Reserve, the OCC and the FDIC extended the comment period on an advance notice of proposed rulemaking on enhanced cyber risk management standards. The proposal, originally issued on October 26, 2016, addressed enhanced cyber risk management standards for large and interconnected entities under the supervision of the federal banking agencies. The proposal addressed five categories of cyber standards: cyber risk governance; cyber risk management; internal dependency management; external dependency management; and incident response, cyber resilience and situational awareness. In its notice announcing the extension of the comment period, the federal banking agencies noted that the range and complexity of the issues addressed in the proposal resulted in the extension of the public comment period. All comments on the proposal are due on February 17, 2017.

The text of the notice of the extension of the comment period is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20170113a1.pdf.

### New York State Department of Financial Services Reproposes Cybersecurity Regulation

On December 28, 2016, the New York State Department of Financial Services (NYSDFS) reproposed its first-in-the-nation cybersecurity regulation to protect New York State from the threat of cyber-attacks. The proposed regulation, which will be effective March 1, 2017, will require banks, insurance companies and other financial services institutions regulated by NYSDFS to establish and maintain a cybersecurity program designed to protect consumers and ensure the safety and soundness of New York State's financial services industry.

The NYSDFS considered comments submitted regarding the previously proposed regulation during a 45-day comment period, which ended on November 14, 2016, and has incorporated appropriate comments in the updated regulation that will be subject to an additional final 30-day notice and public comment period. The NYSDFS will focus its final review on any new comments that were not previously raised in the original comment process.

The reproposed regulation is available at: http://www.dfs.ny.gov/legal/regulations/proposed/rp500t.pdf.

## Derivatives

### US Commodity Futures Trading Commission's Enforcement Division Issues Advisories on Cooperation

On January 19, 2017, the US Commodity Futures Trading Commission's Division of Enforcement issued two new Enforcement Advisories outlining the factors the Enforcement Division will consider in evaluating cooperation by individuals and companies in the agency's investigations and enforcement actions.

The CFTC gives credit for cooperation in determining whether enforcement action is warranted, the nature of charges that should be brought and the appropriate level of sanctions to impose or seek. With the issuance of the recent advisories, the Enforcement Division aims to further incentivize individuals and companies to cooperate fully and truthfully in CFTC investigations and enforcement actions, including by providing high-quality cooperation, self-reporting to the Enforcement Division and providing early and material assistance to the Division.

The advisories complement the CFTC's Office of the Whistleblower and Whistleblower Program, which provide monetary incentives to individuals who report possible violations of the Commodity Exchange Act that lead to a successful enforcement action, as well as privacy, confidentiality and anti-retaliation protections for whistleblowers who share information with or assist the CFTC.

The advisories are available at:
http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf and at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

### US House of Representatives Passes Bill Re-Authorizing the US Commodity Futures Trading Commission

On January 12, 2017, the US House of Representatives passed H.R. 238, the Commodity End-User Relief Act, a bipartisan bill to reauthorize the US CFTC. Although the bill largely mirrors previous legislation to reauthorize the CFTC, it included several regulatory reforms, including a provision regarding the regulation of cross-border swaps, and a provision that would require the CFTC to vote in order to change the current de minimis swap dealer registration threshold of $8 billion.

The text of the bill is available at: http://agriculture.house.gov/about/legislation/h-r-238-commodity-end-user-relief-act.htm.

### US Commodity Futures Trading Commission Issues No-Action Relief for Derivatives Clearing Organizations and Entities Submitting Swaps for Clearing with Certain Derivatives Clearing Organizations

On December 19, 2016, the US CFTC issued time-limited no-action relief to derivatives clearing organizations (DCOs) and reporting entities for certain swaps reporting obligations amended by the Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps that was released on June 27, 2016. The no-action relief letter relieves DCOs from their obligations to report original swap terminations as required by the rule for up to six months or until DCOs can sufficiently test required changes to their reporting systems.

The CFTC also announced no-action relief for entities submitting swaps for clearing with DCOs acting under exemptive orders or no-action relief that has been provided by the CFTC. Entities submitting such swaps are relieved from obligations to terminate the original "alpha" swap and to report any swaps between DCO counterparties acting under such exemptive orders or no-action relief. Entities are also relieved from their obligation to report certain primary economic terms data fields for swaps intended to be cleared by such DCO counterparties as cleared swaps. The relief is conditioned upon the entity providing certain information to fulfil its reporting obligations.

The no-action letters are available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-86.pdf and http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-85.pdf.

### US Commodity Futures Trading Commission Issues No-Action Relief for Swaps with Eligible Affiliate Counterparties Located in Australia or Mexico

On December 15, 2016, the US CFTC issued a no-action relief letter for swaps executed between certain US swap market participants and their affiliated counterparties located in Australia or Mexico. The letter permits US swap market participants to rely on a provision of the inter-affiliate exemption from required clearing that has previously been available to counterparties located in the European Union, Japan, and Singapore. According to the CFTC, the letter was issued in light of the December 13, 2016 compliance date for the CFTC's recent expansion of its clearing requirement to include fixed-floating interest rate swaps denominated in Australian dollars and Mexican pesos, as well as basis swaps denominated in Australian dollars.

The no-action relief letter is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-84.pdf.

### Final EU Equivalence Decisions on Regulatory Regimes Under the European Market Infrastructure Regulation Published

On December 16, 2016, ten decisions on the equivalence of third country regulatory regimes under the European Market Infrastructure Regulation were published in the Official Journal of the European Union.

CCPs established in third countries whose supervisory and legal regimes have been deemed to be equivalent to the EU regime may provide clearing services to clearing members or trading venues established in the Union. Such a CCP must be recognized by ESMA in accordance with the processes outlined in EMIR. The regulatory and legal regimes of India, New Zealand, Japan, Brazil, Dubai International Financial Centre and the UAE have been granted equivalence in relation to CCPs.

Derivative contracts traded on exchanges with equivalence status are not deemed to be OTC derivatives under EMIR and therefore are not subject to the obligation to clear the transactions, report on them and undertake risk mitigation steps as if they were OTC. To be deemed equivalent, a third country market must comply with legally binding requirements in its home state equivalent to EMIR and must also be subject to effective supervision and enforcement in that third country on an ongoing basis. The following exchanges have been granted equivalence status in Singapore: Singapore Exchange Derivatives Trading Limited, Singapore Exchange Securities Trading Limited and ICE Futures Singapore; in Canada, among others: Bourse de Montréal Inc., Canadian Securities Exchange, ICE Futures Canada Inc. and the TSX Inc.; in Japan, among others: the Tokyo Stock Exchange Inc., Osaka Exchange Inc., Tokyo Financial Exchange Inc. and Tokyo Commodity Exchange Inc.; and in Australia: ASX, ASX24 and Chi-X.

The Decisions entered into force on January 5, 2017.

The equivalence decision for CCPs for India is available here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2269&from=EN; New Zealand is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2274&from=EN; Japan is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2275&from=EN; Brazil is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2276&from=EN; DIFC is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2277&from=EN; and UAE is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2278&from=EN.

The equivalence decision for exchanges for Singapore is available here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2270&from=EN; Canada is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2273&from=EN; Japan is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2271&from=EN; and Australia is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2272&from=EN.

### EU Final Secondary Legislation on Margin for Uncleared Derivatives

On December 15, 2016, a Commission Delegated Regulation outlining RTS supplementing EMIR on risk mitigation techniques for uncleared OTC derivatives was published in the Official Journal. EMIR requires counterparties to uncleared OTC derivative transactions to implement risk mitigation techniques to reduce counterparty credit risk. These RTS prescribe the regulatory margin amounts to be posted and collected and the methodologies by which the minimum amount of initial margin and variation margin should be calculated as well as outlining a broad list of securities eligible as collateral for the exchange of margins, such as sovereign securities, covered bonds, specific securitizations, corporate bonds, gold and equities.

The Joint Committee of the ESAs submitted final draft RTS to the Commission on March 8, 2016. On July 28, 2016, the European Commission requested the ESAs to amend the final draft RTS and submit a modified version for approval. The ESAs rejected many of the proposed amendments in an Opinion published on September 8, 2016, including certain amendments relating to concentration limits on initial margin for pensions scheme arrangements, the proposed amendments to the calculation of the threshold against non-netting jurisdictions, amendments relating to the treatment of covered bonds and the treatment of bilateral derivative contracts where a counterparty is a CCP, transactions with third country counterparties and the process for regulators on the exemption of intragroup derivative contracts. The Commission adopted the draft RTS on October 4, 2016.

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

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

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

The RTS entered into force on January 4, 2017.

The RTS is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=EN.

### EU Proposals to Amend Technical Standards on Trade Repository Data Published

On December 15, 2016, ESMA published proposals for amending the RTS on the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data. EMIR requires a trade repository to regularly publish aggregate positions by class of derivatives on the contracts reported to it and to provide access to the data that it collects and maintains to relevant authorities and regulators. ESMA was responsible for preparing the original RTS on the frequency and the details of the information to be made available as well as the operational standards required for aggregation and comparison of data across trade repositories.

ESMA is proposing to amend the original RTS for a number of reasons. First, ESMA is seeking to further define the frequency and timeliness of publication. Second, ESMA is trying to facilitate the assessment of trading volumes in certain classes in commodity derivatives that firms subject to the revised MIFID might need to ascertain in order to fall within the exemption for ancillary activities set out in that directive. Third, the Benchmark Regulation requires index providers to assess the significance of their indexes against the threshold set out in that regulation which would entail the use of EU aggregate derivatives data, and ESMA considers that the exercise could be assisted by allowing access to data across trade repositories. Fourth, ESMA is aiming to avoid double counting of cleared transactions for calculation of the aggregate market volumes. Responses to the consultation are due by February 16, 2017.

The consultation paper is available at: https://www.esma.europa.eu/press-news/esma-news/esma-consults-extending-aggregated-trade-repository-data.

## Financial Crime

### The US Office of Foreign Assets Control Issues Guidance for Compliance with US Sanctions Laws

On January 12, 2017, the US Office of Foreign Assets Control issued a guidance document regarding the provision of certain legal and compliance services by US attorneys and compliance personnel respect to US Sanctions laws. Contemporaneous with the issuance, the US Treasury Department also published new FAQs on the guidance. In the press release accompanying the issuance of the guidance, OFAC made clear that the guidance does not reflect a change in OFAC's policy, but is published in order to respond to inquiries received by OFAC.

The text of the OFAC guidance is available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/compliance_services_guidance.pdf.

The text of the FAQs is available at: https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#csg.

### New York State Department of Financial Services Announces that Anti-Terrorism Transaction Monitoring and Filtering Program Regulation is in Effect

On January 5, 2017, the New York State Department of Financial Services (NYSDFS) Superintendent Maria T. Vullo announced that the Department's transaction monitoring and filtering program regulation took effect as of January 1st. Under the final regulation, institutions regulated by the NYSDFS must: maintain programs to monitor and filter transactions for potential Bank Secrecy Act and anti-money laundering violations and suspicious activity reporting; maintain a filtering program to prevent transactions that are prohibited by the Office of Foreign Assets Control; and submit a confirmation to the NYSDFS regarding compliance with the final rule.

The Shearman & Sterling client alert on the final rule is available at: http://www.shearman.com/en/newsinsights/publications/2016/07/monitoring-of-ny-state-licensed-institutions.

The press release is available at: http://www.dfs.ny.gov/about/press/pr1701051.htm.

### The US Office of Foreign Assets Control Published Updated Iranian Transactions and Sanctions Regulations

On December 22, 2016, OFAC published updated regulations on Iranian Transactions and Sanctions Regulation. The amended regulation narrows the definition of "goods of Iranian origin" and "Iranian-origin goods," allowing for the export and reexport of medical devices and agricultural commodities to Iran. Further, the amended regulation expands the definition of "non-Iranian goods" to include goods transported on a vessel or aircraft through Iranian territorial waters or stopped at a port or place in Iran en route to a destination outside of Iran that have not otherwise come into contact with Iran.

The text of the OFAC regulation is available at: https://www.gpo.gov/fdsys/pkg/FR-2016-12-23/pdf/2016-30968.pdf.

The FAQs on the regulation are available at:

https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#itsr_amend.

### US Financial Crimes Enforcement Network Extends Timing of Report of Foreign Bank and Financial Accounts Filings

On December 16, 2016, the US Financial Crimes Enforcement Network (FinCEN) announced that it is granting a further extension of time for certain Report of Foreign Bank and Financial Accounts (FBAR) filings. The extension was announced in light of the notice of proposed rulemaking FinCEN issued on March 10, 2016, which proposes to revise the regulations implementing the Bank Secrecy Act regarding FBARs. Specifically, one of the proposed amendments in the notice of proposed rulemaking would expand and clarify the exemptions for certain US persons with signature or other authority but no financial interests over foreign financial accounts. On December 8, 2015, FinCEN issued Notice 2015-1 to extend the filing date for FinCEN Form 114 - FBAR for certain individuals with signature authority over but no financial interest in one or more foreign financial accounts to April 15, 2017 (and has granted identical extensions that applied to similarly situated individuals since 2011). FinCEN is now further extending the filing due date to April 15, 2018, for individuals whose filing due date for reporting signature authority was previously extended by Notice 2015-1. This extension applies to the reporting of signature authority held during the 2016 calendar year, as well as all reporting deadlines extended by previous Notices 2015-1, 2014-1, 2013-1, 2012-1 and 2012-2, along with Notices 2011-1 and 2011-2. For all other individuals with an FBAR filing obligation, the filing due date remains April 15, 2017.

The FinCEN Notice is available at: https://www.fincen.gov/sites/default/files/2016-12/FBAR%20Notice%202016%20%28FINAL%2012-8-16%29_0.pdf

### Delay to Certain Draft Technical Standards Supplementing the EU Fourth Anti-Money Laundering Directive

On December 22, 2016, the ESAs published an open letter notifying the European Commission that they would be unable to meet the deadline of December 26, 2016 for submitting final draft RTS supplementing the Fourth Anti-Money Laundering Directive. The 4AMLD mandates the ESAs (made up of the EBA, ESMA and EIOPA) to draft RTS on the measures that banks and other financial institutions should undertake to manage the potential risks of money laundering and terrorist financing where they have branches or majority-owned subsidiaries in third countries that prohibit the implementation of AML and CTF measures consistent with those required by 4AMLD. The delay is attributed to the ESAs' prioritization of other mandates under the 4AMLD for the Joint Committee Work Programme 2016. The ESAs deprioritized the draft RTS as enquiries with regulators and ESA stakeholder groups suggested that there were no countries that prohibited the requisite implementation of AML and CFT measures. Consequently, unlike under other mandates under the 4AMLD, the draft RTS would have limited application in practice. The ESAs intend to start working on the mandate in 2017 and expect to be able to submit final draft RTS by December 31, 2017.

The letter is available at: https://esas-joint-committee.europa.eu/Publications/Letters/ESAS-2016-82_JointLetter_RTS_on_%20Implementation_Impediments_in_3rd_Countries.pdf.

### European Commission Publishes Proposed Directive on Countering Money Laundering by Criminal Law

On December 21, 2016, the European Commission published a legislative proposal for a Directive on countering money laundering by criminal law. The proposed Directive is intended to harmonize and establish minimum rules concerning the definition of criminal offenses and sanctions in the area of money laundering. The proposed Directive would implement international obligations such as the Warsaw Convention and Financial Action Task Force recommendations.

The proposed Directive provides for three specific money laundering activities that, when conducted intentionally, would be punishable as a criminal offense. Member States would be able to impose more stringent rules, for example, by making money laundering committed recklessly or by serious negligence a criminal offense. The three criminal offenses are (i) the conversion or transfer of property, when it is known that the property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or assisting another person involved in the commission of such an offense to evade the legal consequences; (ii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from criminal activity; and (iii) the acquisition, possession or use of property with knowledge at the time of receipt that such property was derived from criminal activity. Criminal activity is defined widely and includes any kind of criminal involvement in the commission of specific crimes such as the participation in an organized criminal group and racketeering, terrorism, trafficking in human beings and migrant smuggling, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, forgery, fraud, corruption, insider trading, tax crimes and cybercrime. Aiding and abetting, inciting and attempting an offense would also be punishable. The proposed Directive provides that for a money laundering offense to be punishable, it would not be necessary, amongst other things, to establish a prior or simultaneous conviction for predicate criminal activity that generated the property or the identity of the perpetrator of the criminal activity that generated the property or other circumstances related to that activity.

An offense committed by an individual would be punishable by a maximum term of imprisonment of at least four years in serious cases. The proposed Directive also provides which circumstances should be considered as aggravating. In addition, the proposed Directive establishes liability of legal persons for any offenses committed for the benefit of the legal person by any individual acting individually or as part of the legal person and who holds a leading position within the legal person based on a power of representation of the legal person, the authority to take decisions on behalf of the legal person or the authority to exercise control within the legal person. Legal persons would be any entity with legal personality under the applicable law, excluding States, public bodies and public international organizations. Legal persons would also be liable where the lack of supervision or control of the relevant individual made the commission of the offense possible by a person under the legal person's authority. Liability for legal persons would include criminal or non-criminal fines and other sanctions, including placing the legal person under judicial supervision, temporary or permanent disqualification of the legal person from undertaking commercial activities and judicial winding up.

Unlike under the UK's current anti-money laundering regime, there is no mechanism in the directive for consent to be obtained from a regulator for transactions. A Member State would have jurisdiction over an offense committed in whole or in part in its territory or where the offender is one of its nationals. Member States may extend that jurisdiction to offenses committed outside of its territory if the offender is a habitual resident in its territory or the offense is committed for the benefit of a legal person established in its territory.

The proposed Directive is now subject to review by the European Parliament and the Council of the European Union. It is proposed that Member States would have two years to transpose the proposed Directive into national law once it is finalized. Denmark, Ireland and the United Kingdom may opt out of the adoption of the proposed Directive.

The UK's anti-money laundering regime is due to be reviewed by the FATF in 2018 and there is currently a lot of activity around the topic with the Criminal Finances Bill 2016-17 currently before the UK Parliament. The Bill forms part of the Government's 2016 Action Plan for AML and counter-terrorist finance and is one of the most significant changes to the UK AML and CTF regime in the last ten years. The Bill, amongst other things, introduces Unexplained Wealth Orders in England, Wales and Northern Ireland. These would require a person who may reasonably be suspected of involvement in or associated with serious criminality or overseas politically exposed persons to explain the origin of their assets that appear disproportionate to their income. The UK already has criminal offenses for money laundering. The Proceeds of Crime Act 2002 provides a maximum sentence of up to 14 years for offenses such as the acquisition, use and possession of criminal property. The Bill also updates the POCA 2002 with the option for regulators to apply to the Court for an extension to the moratorium period, following a request for consent to deal with criminal property, from the current total of 31 days by up to an additional 186 days. Despite the UK's impending departure from the EU, it is likely that it will continue to legislate in accordance with EU legislation, such as the Fourth Anti-Money Laundering Directive which will come into force from June 2017, and account for future legislation such as the proposed Directive with a view to retaining access to EU financial markets.

The proposed Directive is available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2016:826:FIN&qid=1378484867646&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2016:826:FIN&qid=1378484867646&from=EN).

### Former Equity Portfolio Manager Jailed by UK Court for 12 Months for Insider Dealing

On December 21, 2016, Mark Lyttleton, formerly an Equity Portfolio Manager at BlackRock Investment Management (UK) Limited, was sentenced to 12 months jail (reduced from 18 months) on two counts of insider dealing. Mr. Lyttleton was an Investment Portfolio Manager at Blackrock Investment Management (UK) Ltd. Mr. Lyttleton had acted on inside information he obtained by working on deals relating to the relevant stocks and by being a party to conversations conducted by colleagues. The criminal offence of insider dealing is punishable by a fine or up to seven years imprisonment. The FCA charged Mr. Lyttleton with three counts of insider dealing pursuant to the Criminal Justice Act 1993 on September 29, 2016. On November 2, 2016, Mr. Lyttleton pleaded guilty to two counts of insider dealing at Southwark Crown Court. The third charge was subsequently dropped. In addition to the prison sentence, a confiscation order was made in the sum of £149,861.27, and costs were awarded to the FCA totaling £83,225.62.

The FCA press release outlining a summary of the case facts is available at: https://www.fca.org.uk/news/press-releases/mark-lyttleton-sentenced-12-months-imprisonment-insider-dealing.

### Two Convicted of Insider Dealing in the UK Sentenced

On January 13, 2017, the FCA announced that Mr. Manjeet Mohal and Mr. Reshim Birk were sentenced having pleaded guilty to charges of insider dealing. Mr. Mohal was sentenced to ten months imprisonment suspended for two years for two counts of insider dealing. Mr. Birk was sentenced to 16 months imprisonment suspended for two years for one count of insider dealing. During the relevant period, Mr. Mohal came into possession of inside information through his employment relating to the takeover of Logica Plc by CGI Holdings (Europe) Ltd, which he then disclosed to his neighbor, Mr. Birk, and another individual. Mr. Birk then traded on that information, generating profits in excess of £100,000. Mr. Mohal and Mr. Birk were both ordered to undertake community work and a confiscation order of £162,876.69 was made against Mr. Birk.

The FCA's announcement is available at: https://www.fca.org.uk/news/press-releases/two-sentenced-insider-dealing-case.

### Financial Stability Board Publishes 2017 Plan to Address Decline in Correspondent Banking

On December 19, 2016, the Financial Stability Board published an updated progress report outlining its action plan to assess and address the decline in correspondent banking. Correspondent banking relationships enable banks to access financial services in different jurisdictions and provide cross-border payment services to their customers. There has been an increasing concern about the decline in the number of correspondent banking relationships because the ability to send and receive international payments could be impacted, which may have repercussions on growth and the stability and integrity of the financial system. The FSB presented a four point action plan to the G20 in November 2015. The progress report describes the progress that has been made and outlines the deliverables for 2017 to further address the issues.

Among the actions listed, the FSB is to publish a report in April 2017, outlining the findings from its recent survey on correspondent banking and from the end-2016 update of SWIFT data. By March 2017, the FSB will publish suggested main elements (in terms of both contents and modalities) of a communication strategy that jurisdictions could follow in an effort to build trust by communicating the steps taken to improve their anti-money laundering/counter-terrorist financing frameworks and the quality of their supervision of financial institutions. The FSB will continue its discussions with SWIFT and, by April 2017, will publish the process and scope of data for the ongoing monitoring of trends in correspondent banking.

The Basel Committee will also publish its revised guidance on correspondent banking by June 2017. The Basel Committee launched a consultation on the proposed revisions to its guidance to confirm regulatory expectations on the assessment of money laundering and financing of terrorism risks in correspondent banking. The proposed revisions to the guidelines develop the application of a risk-based approach for correspondent banking relationships, including recognizing that not all correspondent banking relationships carry the same level of risk, and also clarify expectations regarding the quality of payment messages and the conditions for appropriate use of "know your customer" (KYC) utilities. The consultation closes on February 22, 2017. The consultation follows the publication by the Financial Action Task Force of its guidance on correspondent banking on October 21, 2016.

The FSB action plan is available at: http://www.fsb.org/wp-content/uploads/FSB-action-plan-to-assess-and-address-the-decline-in-correspondent-banking.pdf.

# Financial Market Infrastructure

### EU Peer Review Report on Supervision of CCP Compliance with Margin and Collateral Requirements

On December 22, 2016, ESMA published the results of a peer review it has conducted into how national regulators ensure and assess compliance by CCPs with the margin and collateral requirements under EMIR. ESMA has a coordination role between national regulators to build a common supervisory culture and consistent supervisory practices. ESMA is required to conduct a peer review of the supervisory activities of the national regulators of CCPs at least annually. ESMA's report on the peer review provides an overview of the approaches of national regulators and sets out ESMA's assessment of the degree of convergence between those approaches. ESMA found inconsistencies in the frequency and depth of the supervision of CCPs (even for CCPs of a similar size or complexity). ESMA highlights various areas for improvement to enhance supervisory convergence, including identification of new services which require an extension of a CCP's authorization, determining significant changes to a CCP's risk model and the ongoing review of CCP collateral policies. The report sets out some examples of good practice that ESMA observed during the review, such as having direct access to the data of a supervised CCP. ESMA intends to follow up on the findings from the peer review by, amongst other things, identifying appropriate tools to enhance supervisory convergence.

ESMA's peer review report is available at: https://www.esma.europa.eu/sites/default/files/library/2016-1683_ccp_peer_review_report.pdf.

### European Regulation on CCP Recovery & Resolution Published

On November 28, 2016, the European Commission published a legislative proposal for a Regulation on the recovery and resolution of CCPs. The aim of the proposed Regulation is to set up a framework for the orderly recovery of a CCP through implementation of recovery plans. Under the proposal, a CCP's recovery plan will need to be agreed between the CCP and its clearing members. If the recovery measures do not restore the CCP's viability, the CCP's resolution authority will have the power to take action to ensure the continuity of the CCP's critical functions and, if needed, resolve the CCP. This includes setting up bridge CCPs. In the event of losses arising under a resolution, these will be borne by a CCP's owners, creditors and counterparties in line with the hierarchy of claims in insolvency. Managers of a CCP will be capable of being replaced and held accountable for wrongdoing under the applicable national laws. The CCP recovery and resolution framework would apply to all CCPs established in the EU. It is not proposed that the recovery and resolution framework would apply to the wider group of a CCP, but a resolution authority would be able to decide on a case-by-case basis whether a recovery plan should include a parent company.

The European Commission notes that recovery and resolution planning for firms other than banks, investment firms and CCPs is still in early stages but that measures may be needed in the future, depending on the economic and financial risks that may arise in specific sectors.

The proposed Regulation is now subject to the European legislative process. It is intended that the proposed Regulation would enter into force on the same day that the proposed revisions to the Bank Recovery and Resolution Directive enter into force. As a regulation, the proposed Regulation would be directly applicable in all EU Member States.

The proposed Regulation is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-856-F1-EN-MAIN.PDF?_sm_au_=iVVW0tjVWfS6s5TP.

# Financial Services

### US Office of the Comptroller of the Currency Launches Web-Based System for Licensing

On January 17, 2017, the OCC launched the agency's new web-based Central Application Tracking System (CATS). The system will assist authorized national banks, federal savings associations and federal branches and agencies with drafting, submission and tracking of licensing and public welfare investment applications and notices. CATS also allows OCC analysts to receive, process and manage those applications and notices. CATS replaces e-Corp and CD-1 Invest, the current OCC electronic filing systems.

The OCC plans to roll out institutions' access to CATS in three phases. The first phase includes banks that are frequent electronic filers with the OCC. The second and third phases of the roll-out of CATS are scheduled to begin in spring 2017. OCC staff will notify institutions regarding the date of their access to CATS several weeks before such access is available.

The OCC bulletin regarding the new system is available at: https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-37.html.

#### US House of Representatives Passes Securities Exchange Act Reform Bill

On January 12, 2017, the US House of Representatives passed H.R. 78, the SEC Regulatory Accountability Act, sponsored by Rep. Ann Wagner (R-MO). The Act would require the US Securities and Exchange Commission to justify the costs and benefits of a proposed regulation prior to its issuance of the same. In addition, before issuing a regulation, the SEC would also be required to do the following: (i) identify the nature and source of the problem its proposed regulation is meant to address; (ii) identify and assess available alternatives; and (iii) ensure that any regulations are consistent and written in plain language. The legislation also contains language requiring the SEC to conduct a retrospective review of its regulations every five years and to perform post-adoption impact assessments of major rules.

The text of the bill is available at: https://www.gpo.gov/fdsys/pkg/BILLS-115hr78ih/pdf/BILLS-115hr78ih.pdf.

#### Members of EU High-Level Expert Group on Sustainable Finance Appointed

On December 22, 2016, the European Commission announced the membership composition of the High-Level Expert Group on sustainable finance. The purpose of the Expert Group is to provide recommendations for a comprehensive EU strategy on sustainable finance as part of the Capital Markets Union. The Commission will draw on such recommendations when determining how to integrate considerations of sustainability into the EU's rules for the financial sector. The Group's advice will outline how the EU should design appropriate and proportionate financial policies, incentives and signals for financial institutions, corporate capital-raisers and markets to direct capital towards sustainable finance and to take operational steps to protect the stability of the financial system from risks related to the environment. The Group will start meeting as of January 2017. An interim report is expected around the middle of the year and a final report in December 2017.

The announcement is available at: http://europa.eu/rapid/press-release_IP-16-4502_en.htm.

#### Final EU Agreement on Draft Prospectus Rules as Part of Capital Markets Union

On December 20, 2016, the Council of the European Union announced that it had reached an agreement with the European Parliament on prospectuses for the issuing and offering of securities. Finalization of the agreement comes after the provisional agreement reached on December 7, 2016. The draft Prospectus Regulation is part of the EU's Capital Markets Union plan. The proposed Prospectus Regulation will replace the current EU Prospectus Directive, revising the regime for companies to raise money on public markets or by public offer to potential investors. The aim is to simplify the rules and administrative obligations for companies wishing to issue shares or debt on the market and reduce the costs of preparing a prospectus, thus fostering cross-border investments in the single market, while at the same time still enabling investors to make informed investment decisions. Some compromise has been reached in the final agreement, such that no prospectuses will be required for capital raisings and crowdfunding projects up to €1 million. It has also been agreed, among other things, that the threshold beyond which the issuance of a prospectus is mandatory be increased from €5 million to €8 million in capital raised. Below that threshold, issuers can raise capital in accordance with rules set for local growth markets.

The Council expects Parliament to approve the regulation at first reading, with the final text then to be submitted for adoption by the Council.

The Council's press release is available at: http://www.consilium.europa.eu/press-releases-pdf/2016/12/47244652884_en.pdf.

You may like to view our client note on the European Commission's proposal for a Prospectus Regulation, available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/02/Prospectus-Directive-the-Commissions-proposal-for-a-new-Prospectus-Regulation-CM-020416.pdf.

### European Supervisory Authorities Consult on the Use of Big Data by Financial Institutions

On December 19, 2016, the Joint Committee of the ESAs launched a consultation paper on the use of big data by financial institutions. Big data refers to the collection, processing and use of high volumes of different types of data from various sources, using IT tools and algorithms. Big data is used to reveal patterns or correlations, to generate new ideas or solutions or to more accurately predict future events. The objective of the consultation is for the ESAs to better understand the impact of the increased use of big data on the financial industry and to assess whether any supervisory or regulatory actions are needed. The ESAs do not consider that the existing EU legislation on data protection, competition, consumer protection and sectoral financial services regulations explicitly addresses big data. The discussion paper seeks feedback on whether there is sufficient flexibility in the existing legislation to cover big data, whether there are any gaps and how the existing legislation impacts the use of big data by the financial services sector. Responses to the consultation are requested by March 17, 2017. The ESAs expect to publish their decision on next steps, if any, before the end of 2017.

The Discussion Paper is available at: https://www.esma.europa.eu/press-news/consultations/joint-committee-discussion-paper-use-big-data-financial-institutions and the FAQs are available at: https://esas-joint-committee.europa.eu/Publications/Other%20Documents/2016-JCESA%20QandA%20on%20Big%20Data.pdf.

### UK Financial Policy Committee Post-Brexit Referendum Financial Stability Report

On November 30, 2016, the Bank of England published its latest Financial Stability report. In the Report, the Financial Policy Committee explains the key risks affecting the UK financial system, how it is addressing these risks and the developments since the Brexit referendum. The Report also includes a summary of the results of the Bank of England's 2016 bank stress test.

The first part of the Report outlines in detail the Committee's analysis of major risks posed to the stability of the UK economy and the action it is taking in light of such risks. The second part of the Report contains a summary of the Committee's analysis of those risks and of the resilience of the financial system. The Committee comments that since the referendum, financial stability in the UK has been maintained despite a challenging period of uncertainty around the domestic and global economic outlook. For example, there have been significant movements in asset prices, including a 12% fall in the sterling exchange rate index. The Committee also comments that the outlook for financial stability in the UK remains challenging as the economy has entered into a period of adjustment. Since July, vulnerabilities that stem from the global economic environment and financial markets have further increased, such as the expected expansionary fiscal policy that could follow the recent US election. The Committee comments that the UK banking system is capitalized to sustain the provision of financial services when faced with severe stresses. Since the global financial crisis, UK banks have built up capital resources with the aggregate common equity Tier 1 capital held by major UK banks now at 13.5% of risk-weighted assets (as at September 2016).

In 2017, the Committee will continue to assess the risks highlighted in the report and the implications of the UK's withdrawal from the EU. There will be two stress tests in 2017, with the annual cyclical scenario and a biennial scenario. The Committee has also committed to review the UK's leverage ratio framework. The Committee will review the progress of its 2013 medium-term priorities, such as the establishment of a medium-term capital framework, end the "too big to fail" approach to resolution and ensure the availability of diverse and resilient sources of market-based finance.

The Report is available at: http://www.bankofengland.co.uk/Pages/reader/index.aspx?pub=fsrnov16&page=1.

### FICC Markets Standards Board Consults on New Issue Process Standard for the Fixed Income Markets

On November 18, 2016, the Fixed Income, Currency and Commodities Markets Standards Board launched a consultation on a proposed New Issue Process Standard for the Fixed Income markets. The FMSB was established in 2015 in response to the Fair and Effective Markets Review conducted by HM Treasury, the Bank of England and the FCA. The FMSB has created Standards to improve conduct in the FICC markets. The draft New Issue Process Standard is intended to improve existing practices so that the new issue process is further streamlined for all participants, including issuers, investors and lead managers. The proposed Standard builds on the ICMA recommendations for Investment Grade primary markets issuance. However, it is wider in scope as it will apply to syndicated offerings of fixed income bonds in the wholesale markets, including investment grade, high yield, securitization and emerging market debt offerings. Once published in final form, the Standard will apply to FMSB member firms, which are expected to comply with it on a global basis, subject to regulatory restrictions in certain jurisdictions. Responses to the consultation were due by January 17, 2016.

The proposed New Issue Process Standard is available at: http://www.femr-mpp.co.uk/wp-content/uploads/2016/11/16-11-14-FMSB_NewIssuesProcess_FIMarkets_TransparencyDraft-Final-1.pdf.

### International Organization of Securities Commissions Publishes Final Report on Benchmark Regulation

On December 16, 2016, the International Organization of Securities Commissions published its final Report outlining Guidance on reporting in compliance with its Principles for Financial Benchmarks. The purpose of the Guidance is to increase the consistency and quality of reporting by Benchmark Administrators on their compliance with the Principles, which were published in July 2013. The Principles outline a set of recommended practices that should be implemented by Benchmark Administrators and Submitters. The Report follows a survey of 29 Benchmark Administrators conducted by IOSCO, to identify any relevant challenges and issues, on topics such as the status of their implementation of the Principles and the number of benchmarks they administer. IOSCO developed the Guidance based on the feedback received.

The Report is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD549.pdf and the Principles for Financial Benchmarks is available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf.

## FinTech

### New York State Department of Financial Services Superintendent Submits Comment Letter to US Office of the Comptroller of the Currency Opposing Proposed Special Purpose National Bank Charter for FinTech Companies

On January 17, 2017, NYSDFS Superintendent Maria T. Vullo submitted a comment letter opposing the OCC's proposal to create a new national bank charter for FinTech companies. Vullo noted that a one-size-fits-all federal charter will not work to create a level-playing field among all financial services companies, or to alleviate risks. Rather, she argued, the proposal increases risk, creates an opportunity for regulatory arbitrage and attacks states sovereignty.

The letter provides that the OCC has never regulated nonbank financial institutions, and that state regulators like NYSDFS are experienced and therefore better equipped to regulate cash-intensive nonbank financial service companies. Furthermore, the NYSDFS argued that the National Bank Act does not provide the OCC with authority to create this new proposed charter, which would create an entirely new federal regulatory program resulting in regulatory uncertainty and possible evasion of important state consumer protection laws. The letter also notes that a national charter would likely stifle, rather than encourage innovation, since it would provide a means for large "too big to fail" firms to control the development of technology solutions, thereby harming existing banks and small businesses seeking to serve local communities.

NYSDFS has called on state regulators, legislators and other policymakers to oppose the OCC's proposed special charter and support the nation's strong state-based regulatory system.

The NYSDFS comment letter is available at: http://www.dfs.ny.gov/about/occ_letter1-17-17.pdf.

#### New York State Department of Financial Services Grants Virtual Currency License to Coinbase, Inc.

On January 17, 2017, the NYSDFS approved the application of Coinbase, Inc., a wholly owned subsidiary of Coinbase Global, Inc., for a virtual currency and a money transmitter license. As part of its review of Coinbase's application, NYSDFS analyzed the company's anti-money laundering, capitalization, consumer protection and cyber security policies. Coinbase, which is subject to ongoing supervision by NYSDFS, offers services for buying, selling, sending, receiving and storing bitcoin.

NYSDFS approved five firms for virtual currency charters or licenses, while denying other applications that did not meet NYSDFS's standards. In addition to Coinbase, NYSDFS granted licenses to XRP II and Circle Internet Financial and charters to Gemini Trust Company and itBit Trust Company. ChangeCoin Inc., Ovo Cosmico Inc., Snapcard Inc. and OKLink PTE. LTD. each received application denial letters ordering them to stop any New York operations.

NYSDFS has previously licensed technology-based money transmitters under New York's money transmitter law, online lenders under New York's banking law and virtual currency exchanges under New York's financial services law.

The NYSDFS press release is available at: http://www.dfs.ny.gov/about/press/pr1701172.htm.

### MiFID II

#### European Securities and Markets Authority Opines on the Scope of Product Intervention Powers

On January 12, 2017, ESMA published an Opinion on the scope of the product intervention powers under the Markets in Financial Instruments Regulation. The Opinion focuses on the impact of the exclusion for fund managers from the scope of the MiFIR intervention powers. MiFIR gives national regulators the power to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments (such as units or shares in Undertakings in Collective Investment in Transferable Securities or Alternative Investment Funds) in the EU by investment firms and banks, whether the UCITS or AIF is internally or externally managed, or financial instruments with certain specified features or a type of financial activity or practice. The intervention power only applies to banks authorized under the Capital Requirements Directive and to investment firms authorized under the revised Markets in Financial Instruments Directive (known as "MiFID Firms"), when providing investment services and/or performing investment activities and to market operators including any trading venues they operate. The intervention powers will apply from January 3, 2018, in accordance with the application date of MiFIR.

ESMA has outlined the consequences of a perceived possible lack of clarity around the exclusion of UCITS management companies and AIF Managers from the scope of the MiFIR intervention powers. AIF and UCITS may, as per their authorization under other EU legislation, market units or shares of the AIF or UCITS they manage. If a restriction were to be applied to a MiFID firm in relation to distribution of a UCITS or AIF, such a restriction could not then be applied to a fund management company, because such entities are outside the scope of the intervention powers. As a result, despite the intervention powers, the distribution of UCITS or AIFs subject to MiFIR could still continue through fund management companies if they decide to market their funds themselves.

ESMA is concerned that the discrepancy in the application of the intervention powers may create a risk of arbitrage between MiFID firms and fund management companies and that it could reduce the impact of future measures by leaving entities performing similar activities or distributing funds directly, outside the scope of the intervention powers. There are also financial group structures in many Member States which include both MiFID firms and fund management companies. Such structures could be used to circumvent a ban by channeling the marketing through fund management companies of the group that fall outside of the scope of the intervention power.

ESMA concluded that the EU institutions should address the risk of arbitrage between MiFID firms and fund management companies, suggesting specifically that national regulators and ESMA should have the power to apply the restrictions/prohibitions directly to fund management companies. The additional power would provide a common tool for regulators and ESMA across entities and instruments and assist in the creation of a level playing field across MiFID entities and fund management companies.

The Opinion is available at: https://www.esma.europa.eu/press-news/esma-news/esma-calls-consistent-application-mifir-product-intervention-powers.

### European Securities and Markets Authority Follows Up on Supervision by National Regulators of Best Execution Requirements

On January 11, 2017, ESMA published a follow-up report to the 2015 peer review on best execution. MiFID requires investment firms to provide best execution for their clients when executing their clients' orders. ESMA conducted a peer review on how national regulators supervised and enforced the requirements in 2011 and 2012 and published the results in February 2015, recommending, amongst other things: (i) prioritization of best execution by national regulators; (ii) the allocation of supervisory resources; and (iii) the adoption of a proactive approach to monitoring compliance with best execution requirements, including through onsite inspections. In 2016, ESMA began to assess whether national regulators had taken steps to address the shortcomings identified in the peer review. The 2017 report shows that national regulators are being more proactive in their supervision of best execution. However, there are still some deficiencies that need to be addressed as some national regulators were not able to show progress in relationship to deficiencies previously identified. ESMA's view is that regular and proactive supervision and monitoring of compliance with the best execution requirements is the only way to ensure investor protection in this area. Firms will continue to be subject to best execution requirements when the MiFID II package comes into effect on January 3, 2018 and ESMA urges national regulators to act to ensure that there is compliance with best execution requirements by investment firms.

ESMA's 2017 follow-up report is available at: https://www.esma.europa.eu/press-news/esma-news/esma-finds-improvement-in-regulators%E2%80%99-supervision-mifid-best-execution and the 2015 peer review report is available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-494_peer_review_report_on_best_execution_under_mifid_0.pdf.

### UK Financial Conduct Authority Publishes Fourth Consultation on Implementing MiFID II

On December 16, 2016, the FCA published its fourth consultation paper on the implementation of the revised MiFID in the UK. MiFID II regulates retail and wholesale investment business. The consultation covers technical matters that were outside the scope of previous consultations and includes proposed changes to the FCA Handbook on specialist regimes, tied agents, market data, SME growth markets and transitional fees.

The FCA is proposing to update section 18 of the Conduct of Business Sourcebook of the Handbook by updating cross-references to correspond to the FCA's proposed changes to other sections of COBS. COBS 18 contains a number of tailored conduct regimes covering both MiFID and non-MiFID business, for specialist types of designated investment business.

The FCA is proposing amendments to Handbook rules on appointed representatives to reflect the technical changes in MiFID II and the tied agents regime. The proposals are particularly relevant to firms undertaking MiFID or equivalent third country business. Under MiFID II, all Member States will be required to maintain tied agents regimes, whereas they currently have an option as to whether to do so. As a result, the FCA is seeking to clarify the territorial application of the appointed representative rules. MiFID II also changes the scope of permitted activities relating to structured products for tied agents and the FCA is proposing to introduce new definitions of "MiFID optional exemption AR" and "structured deposit AR." The new terms will define the new populations of authorized representatives to which MiFID tied agent requirements will also apply.

On the topic of market data, existing provisions of the Market Conduct Sourcebook outline the FCA's expectation that Data Reporting Service Providers should have an open, constructive and co-operative relationship with the FCA. The FCA is proposing minor changes to some of the proposed provisions relating to DRSPs, in particular, by requiring a DRSP to provide an annual notification within three months of the anniversary of its first authorization instead of within 10 business days. The FCA is also proposing to amend its guidance on the reporting obligations of trading venues by clarifying that trading venues can use ARMs to report transaction reports to it and that a group of investment firms may aggregate their reporting via an internal hub, provided the hub uses an Approved Reporting Mechanism or is an ARM.

MiFID II will introduce a new sub-category of Multilateral Trading Facility called "SME growth markets." The FCA is proposing to update the Handbook to include provisions on SME growth markets, including how firms can apply to be registered as an SME growth market.

There are also a number of miscellaneous changes to various modules of the Handbook being proposed by the FCA, including changes to the Perimeter Guidance that build on previous consultations on forward foreign exchange, commodity derivatives and new exemptions for professional firms and commodity derivatives trading. Other proposed changes relate to the territorial scope of rules on remuneration and training and competency. The FCA is proposing, among other things, that a UK branch of an incoming EEA firm (unless it is a UCITS investment firm or an AIFM investment firm) will be subject to the 'Remuneration and performance management of sales staff' chapter of the Handbook.

The FCA is proposing a transitional rule to account for the period between January 30, 2017, which is when the FCA will begin accepting applications for authorization under MiFID II, and the point at which legislation will allow the FCA to collect fees for those applications.

The FCA is seeking comments by February 17, 2017, except for the proposals on fees, for which comments are due by January 16, 2017. Despite being its final consultation paper on the implementation of MiFID II, the FCA will consult on any further issues as necessary in its quarterly consultation papers. Member States are required to finalize their laws and regulations implementing MiFID II by July 3, 2017. MiFID II will apply from January 3, 2018. The FCA intends to publish its final rules and Policy Statement on the issues raised in this consultation in June 2017. That Policy Statement will also cover the issues consulted on in the FCA's second and third consultation papers. The Policy Statement for the topics covered in the first consultation paper is expected in March 2017.

The consultation paper also contains the FCA's feedback on the changes to Form A, which is the application form used to register individuals to perform controlled functions under the approved persons regime. The FCA is proceeding with its proposed new Form A as consulted on in its third consultation paper for firms seeking authorization under MiFID to submit information for the approval of individuals who will be members of the management body or effectively direct the business of the MiFID firm. The name of the form will be changed to "Long Form A—UK and Overseas Firms (not Incoming EEA) for MiFID 2 authorisation applications." Firms will be able to use this form starting from January 30,

2017. However, applications using the form will be treated as draft applications until the Policy Statement and final rules are published.

The FCA's first consultation paper, published on December 15, 2015, related to issues associated with the FCA's regulation of the secondary trading of financial instruments. The second consultation paper covered commodity derivatives, operating an Organised Trading Facility and requirements for senior management of investment firms. The third consultation was on conduct of business requirements (covering topics such as inducements, research, client categorization, disclosure requirements, independence, dealing and managing, suitability, appropriateness and investment research), product governance, supervision and authorization, knowledge and competence requirements and perimeter guidance.

The consultation paper is available at: https://www.fca.org.uk/publication/consultation/cp16-43.pdf.

The third consultation paper is available at: http://finreg.shearman.com/uk-financial-conduct-authority-consults-further-o, the second consultation paper is available at: http://finreg.shearman.com/uk-regulator-publishes-second-consultation-paper- and the first consultation paper is available at: http://finreg.shearman.com/uk-regulator-consults-on-implementing-the-revised.

## Payment Services

### European Banking Authority Publishes Final Draft Technical Standards on Information Sharing Between National Regulators for Passporting of Payment Services

On December 14, 2016, the EBA published final draft RTS on the cooperation and exchange of information between national regulators where an authorized payment institution would like to provide payment services in a Member State other than its home Member State (so-called passporting) under the Payment Services Directive (also known as PSD2). The Directive aims to make payments between Member States as secure, easy and efficient as those made within a Member State. PSD2 focuses on electronic payments and payment services within the EU, regulating new types of payment services and payment services providers, which are currently unregulated, and stimulating competition in the electronic payments market. The RTS aim to ensure that information about those entities carrying out business in EU Member States is exchanged between national regulators in a consistent way, clarity for payment institutions about their regulatory requirements, and specifies the information that is to be shared between national regulators. The EBA consulted on draft RTS in late 2015 and, having taken feedback into account, has made certain amendments to the final draft RTS, including removing some of the information requirements on payment institutions relating to governance arrangements and internal control mechanisms, outsourcing and the agent structural organization. In addition, the EBA has now provided separate templates for when a payment institution or e-money institution is using an agent or when a distributor is used.

Member States must transpose PSD2 into their national laws by January 13, 2018 and apply those laws from that date, subject to certain exceptions and transitional measures. PSD2 will repeal the current Payment Services Directive with effect from January 13, 2018. The European Commission will now consider whether to adopt the final draft RTS.

The final draft RTS is available at:
http://www.eba.europa.eu/documents/10180/1694291/Final+draft+RTS+on+passporting+%28EBA-RTS-2016-08%29.pdf.

## Recovery & Resolution

### US Federal Deposit Insurance Corporation Proposes Rule Regarding Recordkeeping Requirements for Qualified Financial Contracts

On December 13, 2016, the FDIC released a notice of proposed rulemaking that proposed amendments to its rule regarding recordkeeping requirements for qualified financial contracts (QFCs) (12 CFR Part 371). The rule currently requires an insured depository institution in troubled condition to maintain detailed recordkeeping requirements about its QFCs which would ultimately make it easier for the FDIC to transfer, disaffirm or repudiate such QFCs in the event of an FDIC receivership. The proposed rule would align Part 371 more closely with the QFC recordkeeping requirements adopted by the Secretary of the Treasury in connection with the Orderly Liquidation Authority under Title II of Dodd-Frank. The proposed rule would expand the scope of records required to be maintained under Part 371 and update the recordkeeping requirements accordingly.

The notice of proposed rulemaking is available at: https://www.fdic.gov/news/board/2016/2016-12-13_notice_sum_a_fr.pdf.

### US Federal Reserve Board and Federal Deposit Insurance Corporation Announce Four US G-SIBs Have Remediated Resolution Plan Deficiencies

On December 13, 2016, the US Federal Reserve Board and the FDIC announced that Bank of America, Bank of New York Mellon, JP Morgan Chase and State Street had adequately remedied all deficiencies in their 2015 resolution plans that caused the plans to be deemed "not credible" by the regulators. The Federal Reserve Board and the FDIC announced that Wells Fargo has not adequately remedied two of the firm's three deficiencies and it is expected to file a revised submission addressing the deficiencies by March 31, 2017. Wells Fargo is subject to restrictions on activities until the deficiencies are remedied.

The press release is available at: https://www.federalreserve.gov/newsevents/press/bcreg/20161213a.htm.

### European Banking Authority Publishes Final Report on MREL Framework

On December 14, 2016, the EBA published its final Report on the design and implementation of the minimum requirement for own funds and eligible liabilities framework. MREL is the EU equivalent of the US Total Loss Absorbing Capacity (known as TLAC) rule. The Report is addressed to the European Commission following publication of its proposed banking reform package on November 23, 2016 which included proposals to amend the Bank Recovery & Resolution Directive and the CRR to integrate the TLAC Standard into the EU's MREL framework. The EBA does not currently consider that any changes to the key principles underlining the RTS (adopted by the Commission in May 2016) on the criteria for setting MREL are needed. The Report does, however, identify changes with a view to improving the technical soundness of the MREL framework and implementing the TLAC Standard as a key component of that framework. The EBA has made recommendations on twelve topics.

The EBA recommends, among other things, that the reference base for the MREL requirement be changed from total liabilities and own funds to risk-weighted assets, with a leverage ratio exposure backstop requirement, to align regulatory capital requirements with that of MREL requirements. The EBA is also recommending changes to the MREL stacking order, such that banks in the EU should not be able to count Common Equity Tier 1 capital towards MREL while also using such capital to meet regulatory capital buffers. The EBA also recommends that if regulators and resolution authorities become aware of any potential breaches of capital or MREL requirements through their monitoring processes, they should be required to inform each other.

On redemption and maturity management, the EBA is recommending that the legislative framework should contain a requirement for resolution authorities to monitor the maturity profile of the MREL-eligible instruments of each institution for which an MREL requirement has been set. The legislative framework should also include a power for the resolution authority to modify the maturity profile of its MREL stack. The EBA also recommends that a redemption approval regime be introduced for MREL-eligible instruments.

With regard to the treatment of cross-holdings of MREL eligible instruments, the EBA recommends that exposures to MREL-eligible instruments issued by all banks should be deducted from MREL on a like-for-like basis above a double threshold meant to preserve a share of market-making activity.

The EBA made a number of recommendations on the level and form of subordination. On the level of subordination, amongst other things, the EBA recommends that under the revised framework, global systemically important banks should be required to meet their MREL with subordinated instruments, at least to a level of 16% of RWAs in 2019 and 18% of RWAs in 2022 in line with the TLAC term sheet. The EBA did not recommend a particular form of subordination; however, the various national options for statutory subordination should be harmonized.

The EBA recommends the introduction of third country recognition requirements and a reduction in the burden of compliance for such recognition. This could be achieved by narrowing the scope of requirements and maintaining the effectiveness of contractual recognition of MREL liabilities.

In addition, the EBA recommends that the adequacy and calibration of MREL should be closely linked to, and justified by, the bank's resolution strategy.

On intragroup issues, the EBA proposes that amendments be made to the MREL framework to provide for the identification of resolution authorities and the allocation of internally issued subordinated MREL at the non-resolution-entity level.

The EBA recommendations cover reporting issues, in particular, the introduction of an explicit obligation for banks to regularly report their level and composition of their MREL liabilities (as well as those required from them by their resolution authorities). The EBA also makes recommendations on disclosure requirements during the steady state and the transitional period. In the steady state, the EBA recommends that EU banks should be required to disclose the quantum and composition of their MREL-eligible liabilities including the MREL required from them by their resolution authorities. During the transitional period, and pending the recommendation from the Basel Committee, banks in the EU should be required to disclose to investors the quantum and composition of their stack of MREL-eligible liabilities, as well as information on the creditor hierarchy (at a minimum).

The European Parliament and Council will continue to deliberate on the Commission's legislative proposals over the coming months. The Report is not binding on the Commission; however, the EBA is confident that the Report will assist in providing information on technical aspects that are not yet final. The Commission's proposals forecast the publication of reports on the implementation and impact of MREL by the EBA every other year, with additional reports to be published at the EBA's discretion.

The Report is available at:
http://www.eba.europa.eu/documents/10180/1695288/EBA+Final+MREL+Report+%28EBA-Op-2016-21%29.pdf; the Q&A is available at: http://www.eba.europa.eu/documents/10180/1695288/MREL+Report+-+FAQ.pdf and further information on the Commission's banking reform package is available at: http://finreg.shearman.com/european-commission-proposes-draft-quotcrd5quot-a.

You might like to view our client note - Implications for Bank Creditors: the Latest EU Banking Reform Proposals, available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/12/Implications-for-Bank-Creditors--the-Latest-EU-Banking-Reform-Proposals-FIAFR-120616.pdf.

### UK Legislation to Ensure Continuity of Functions for Firms in Resolution Comes into Force

On December 16, 2016, the UK Bank Recovery and Resolution Order 2016 came into force. The Order implements in part the BRRD which sets out the framework for the recovery and resolution of banks and investment firms. The Order amends the Banking Act 2009, the Financial Services and Markets Act 2000 and certain related secondary legislation to, amongst other things, ensure that the Bank of England, as the UK's resolution authority, and the PRA and FCA, as the regulators, have powers to manage the failure of a bank or investment firm and their group companies to ensure that critical functions continue to be performed. The Order also provides specific powers to the PRA and FCA to replace directors and senior managers and appoint temporary managers in accordance with the BRRD, amends provisions relating to triggers of contractual termination rights and adds new provisions relating to the resolution of UK branches of third-country institutions.

The Order is available at: http://www.legislation.gov.uk/uksi/2016/1239/pdfs/uksi_20161239_en.pdf.

### Financial Stability Board Consults on Proposed Guidance on Continuity of Access to Financial Market Infrastructure for Firms in Resolution

On December 16, 2016, the FSB launched a consultation on proposed Guidance on continuity of access to financial market infrastructures for a firm in resolution. The FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions provides that resolution authorities should develop resolution strategies and plans for firms that are systemically important. One objective of those plans is to ensure that a firm can maintain its critical functions during resolution. In particular, access to the services that support those functions, including access to services provided by FMIs such as clearing, payment, settlement and custody shared services, should be maintained.

The proposed Guidance is intended to assist national supervisors and resolution authorities to evaluate whether a firm has appropriate arrangements to support continuity of access to critical FMI services in all circumstances. The proposed Guidance covers the arrangements needed to support access to FMIs at the level of providers of critical FMI services, arrangements at the level of the firm and/or FMI participants and the role of FMI supervisors in facilitating continuity of access to critical FMI services. Responses to the consultation are requested by February 10, 2017.

The consultation paper is available at: http://www.fsb.org/wp-content/uploads/Continuity-of-Access-to-FMIs-Consultation-Document-FINAL.pdf.

### Financial Stability Board Consults on Internal Loss-absorbing Capacity of G-SIBs

On December 16, 2016, the FSB published a consultative paper containing draft Guiding Principles on the internal total loss-absorbing capacity or Internal TLAC of global systemically important banks. The FSB is proposing the Guiding Principles to support the implementation of the TLAC Standard. The TLAC Standard is designed to ensure that failing G-SIBs will have sufficient loss-absorbing and recapitalization capacity available in resolution. The FSB committed to develop implementation guidance on the TLAC Standard, in particular for internal TLAC. Internal TLAC is the loss-absorbing resources that a resolution entity commits to its material subsidiaries. The proposed Guiding Principles cover, among other things: (i) the process for identifying material sub-groups, the composition of sub-groups, the distribution of internal TLAC between the entities within material sub-groups and the treatment of unregulated or non-bank entities; (ii) the role of home and host authorities and the factors to be considered when determining the size of the internal TLAC requirement; (iii) practical considerations relating to the issuance and composition of internal TLAC; (iv) the trigger mechanism for internal TLAC; and (v) cooperation and coordination between home and host authorities in triggering the write-down and/or conversion into equity of internal TLAC. Responses to the consultation are due by February 10, 2017. The FSB intends to review the technical implementation of the TLAC Standard by the end of 2019.

The consultation paper is available at: http://www.fsb.org/wp-content/uploads/Guiding-Principles-on-the-Internal-Total-Loss-absorbing-Capacity-of-G-SIBs.pdf.

## Securities

### US Securities and Exchange Commission Signs Memorandum of Understanding with Hong Kong Securities and Futures Commission

On January 19, 2017, the SEC announced the establishment of a comprehensive arrangement with the Hong Kong Securities and Futures Commission (SFC). The new supervisory cooperation arrangement will augment the SEC's and the SFC's ability to share information about regulated entities that operate in the United States and Hong Kong, including investment advisers, broker-dealers, securities exchanges, market infrastructure providers and credit rating agencies. The new comprehensive arrangement expands upon the one from 1995 that was limited to investment management activities.

Supervisory cooperation arrangements establish mechanisms for ongoing consultation and the exchange of information regarding the oversight of global firms and markets. Such information may include routine supervisory information as well as information regulators need to monitor risk concentrations, identify emerging risks and better understand a globally active regulated entity's compliance culture. These arrangements also facilitate the ability of the SEC and its counterparts to conduct on-site examinations of registered entities located outside the United States.

The Memorandum of Understanding is available at: https://www.sec.gov/about/offices/oia/oia_bilateral/hongkong-011817.pdf.

## People

### US Commodity Futures Trading Commission Names J. Christopher Giancarlo Acting Chairman

On January 20, 2017, the CFTC designated Commissioner J. Christopher Giancarlo per seriatim as Acting Chairman of the agency. Mr. Giancarlo joined the CFTC on June 16, 2014 after being unanimously confirmed by the US Senate on June 3, 2014, to serve as a Commissioner of the CFTC. Commissioner Giancarlo succeeded Timothy Massad who had served as Chairman since June 5, 2014.

The CFTC press release is available at: http://www.cftc.gov/PressRoom/PressReleases/pr7519-17.

### Enforcement Director Aitan Goelman to Leave US Commodity Futures Trading Commission

On January 19, 2017, the CFTC announced that Division of Enforcement Director Aitan Goelman will leave the agency on February 3, 2017. A successor has not yet been named.

The CFTC press release is available at: http://www.cftc.gov/PressRoom/PressReleases/pr7517-17.

### General Counsel Anne K. Small to Leave US Securities and Exchange Commission

On January 18, 2017, the SEC announced that General Counsel Anne K. Small will leave the agency later this month. Upon Ms. Small's departure, Sanket Bulsara, Deputy General Counsel for Appellate Litigation, Adjudication, and Enforcement, will become the Acting General Counsel.

The SEC press release is available at: http://www.sec.gov/news/pressrelease/2017-22.html.

### US Board of Governors of the Federal Reserve System Names Director of Division of Financial Stability

On December 12, 2016, the Federal Reserve appointed Andreas Lehnert as director of its Division of Financial Stability, effective December 25, 2016.

## Upcoming Events

February 2, 2017: FCA asset management market study roundtable on asset management market study remedies

February 9, 2017: EBA public hearing on draft Guidelines on major incidents reporting under the PSD 2

February 27, 2017: EBA public hearing on proposed Guidelines on the supervision of significant branches

## Upcoming Consultation Deadlines

January 26, 2017: OFSI, HM Treasury consultation on implementation of the new civil monetary penalty regime

January 26, 2017: FCA consultation on its approach to regulation as set out in its document “Our future mission”

January 28, 2017: EBA consultation on new Guidelines on internal governance

January 28, 2017: EBA and ESMA joint consultation on proposed Guidelines on the Assessment of the Suitability of the Members of Management Body and Key Function Holders

February 1, 2017: UK PSR consultation on remedies for competition issues relating to bank ownership of payment infrastructure

February 2, 2017: EBA consultation on a draft design of a new prudential regime for investment firms

February 3, 2017: EBA consultation on draft Guidelines on authorization and registration under PSD2

February 8, 2017: EBA consultation on proposed technical standards on the information to be provided for the authorization of banks

February 10, 2017: EBA consultation on draft Guidelines on the application of the IRB approach (PD estimation, LGD estimation and treatment of defaulted assets)

February 10, 2017: FSB consultation on draft Guidance on continuity of access to financial market infrastructures for a firm in resolution

February 13, 2017: Comments on US Federal Reserve Board proposal to fully apply the Federal Reserve Board’s existing rating system for bank holding companies to savings and loan holding companies.

February 15, 2017: FCA call for input into its review of high-cost credit, including the high-cost of short-term credit (HCSTC) price caps

February 16, 2017: ESMA consultation on proposed amendments to the RTS on trade repository data

February 20, 2017: FCA consultation on remedies to issues identified in the Interim Report on Asset Management Market Study

February 20, 2017: Comments due to the US Federal Reserve Board on Notice of Proposed Rulemaking regarding risk-based capital and other regulatory requirements for activities of financial holding companies, related to physical commodities and risk-based capital requirements for merchant banking investments.

February 22, 2017: Basel Committee consultation on proposed revisions to the correspondent banking and account opening annexes of its Committee Guidelines on sound management of risks related to money laundering and financing of terrorism

February 27, 2017: PRA consultation on implementation of MiFID II—Part II

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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