

## DERIVATIVES

See “ESMA Publishes Updated Q&As on MiFID II and MiFIR Commodity Derivatives Topics” in the *EU Developments* section.

## CFTC

### **NFA Amends Interpretive Notice Regarding ISSPs**

On January 7, the National Futures Association (NFA) issued a notice to its members that amendments to its Interpretative Notice, entitled NFA Compliance Rules 2-9, 2-36 and 2-49: *Information Systems Security Programs*, were finalized and will take effect on April 1.

The amendments make certain changes to the Interpretive Notice related to employee training obligations and information systems security program approval, as well as require NFA members to notify the NFA of certain cybersecurity incidents related to a member’s commodity interest activities.

The proposed amendments were previously discussed in the December 7, 2018 edition of [Corporate & Financial Weekly Digest](#).

NFA Notice I-19-01 is available [here](#).

## DIGITAL ASSETS AND VIRTUAL CURRENCIES

See “ESMA and EBA Publish Advice on Cryptoassets” in the *EU Developments* section.

## BREXIT/UK DEVELOPMENTS

### **Draft PRIIPs Regulations 2019 Published**

On January 9, a draft of the Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019 (Draft Regulations 2019) was published together with a draft explanatory memorandum.

The purpose of the Draft Regulations 2019 is to ensure that the regime established under EU Regulation on Key Information Documents for PRIIPs (PRIIPs Regulation) continues to operate effectively after the United Kingdom’s withdrawal from the European Union (Brexit).

The Draft Regulations 2019 amend the Packaged Retail and Insurance-based Investment Products Regulations 2017 and the retained version of the PRIIPs Regulation and Commission Delegated Regulation and Commission Delegated Regulation on product intervention powers.

The Draft Regulations 2019 will go into effect when the United Kingdom exits the European Union on March 29.

The Draft Regulations 2019 are available [here](#) and the explanatory memorandum is available [here](#).

## **FCA TPR Notification Window Now Open for EEA-Passported Firms and Fund Managers**

On January 7, the UK Financial Conduct Authority (FCA) announced that the notification window for the temporary permissions regime (TPR) is now open.

In the lead-up to the United Kingdom's exit from the European Union (Brexit) on March 29 (Exit Day), the agreement on the United Kingdom's withdrawal (Withdrawal Agreement) has not been ratified by the UK Parliament. If ratification fails, this would result in a so-called "no-deal Brexit," meaning that the UK would leave the EU without having agreed on any transitional arrangements, and any European Economic Area (EEA)-based firms or fund managers passporting their services or products into the UK would lose their permission to do so on Exit Day.

Given the continuing political uncertainty surrounding Brexit, the FCA is preparing for a no-deal Brexit and EEA-based firms passporting activities into the United Kingdom have been directed to prepare in a similar way. Such preparations include EEA-based firms notifying the FCA of their intention to continue to operate in the UK, but under the FCA's TPR. Failure to do so would result in EEA-based firms having to seek authorization from the UK's regulators if they wish to continue carrying on regulated financial services activities in the UK in the event of a no-deal Brexit.

### **The TPR**

The TPR would enable firms established in the EEA to continue passporting activities into the UK for a limited period after Exit Day in the event of a no-deal Brexit. Permanent FCA authorization would only be needed by the end of the transition period, which is set by the Withdrawal Agreement to operate from Exit Day until December 31, 2020.

Only EEA firms that are already authorized to carry on regulated activities in the UK by passporting are eligible to enter the TPR. EEA firms without passports would not benefit from the "overseas persons" exemption. This exemption would only continue to be of benefit to firms that do not have a permanent place of business in the UK from which regulated activities are conducted.

### **TPR Notification Requirements**

As from January 7, FCA-authorized firms can notify the FCA that they wish to enter the TPR using the form available on the FCA's Connect system, without charge. The FCA also has provided guidance to passporting EEA firms and fund managers on the TPR notification process.

The notification window will close at the end of March 28, after which firms that have not submitted notification by then will not be able to enter or rely on the TPR, but will instead be subject to the financial services contracts regime (FSCR) (subject to meeting the relevant conditions—for more information on the FSCR see the [January 11, 2019](#) edition of *Corporate & Financial Weekly Digest*).

Once a firm has notified the FCA that it wishes to enter the TPR, it will be allocated a period of time (a "landing slot"), based on the type of business undertaken, during which it can submit the application for recognition by the FCA or notification under the national private placement regime. After Exit Day, the FCA will confirm firms' landing slots so that they can prepare their respective applications. The FCA expects the first landing slot will be from October to December 2019, followed by five more landing slots, with the last to close at the end of March 2021. Details of firms with temporary permission will be shown on the *Financial Services Register*. Once an FCA-regulated firm receives recognition, it will leave the TPR.

The FCA's announcement, together with its guidance to passporting fund managers and firms, is available [here](#).

## BREXIT/EU DEVELOPMENTS

### **Council of EU Agrees on Its Position on Proposed Investment Firms Regulation and Directive**

On January 7, the Council of the European Union published a press release announcing that its Permanent Representatives Committee has agreed on its position relating to the proposed Investment Firms Regulation (IFR) and the proposed Investment Firms Directive (IFD). The Council also has published its compromise proposals on the IFR and the IFD.

The IFR and the IFD will, for all but the largest investment firms, replace the existing prudential requirements for investment firms currently set out in the Capital Requirements Regulation and the fourth Capital Requirements Directive.

The European Parliament voted on its position in relation to the IFR and IFD in September 2018 (for more details, see the [September 24, 2018](#) edition of *Corporate & Financial Weekly Digest*).

The Council and the Parliament will now begin trilogue negotiations.

The Council's press release is available [here](#).

### **FCA Consults on Contractual Certainty Post-Brexit**

On January 8, the UK Financial Conduct Authority (FCA) published a consultation paper (CP19/2) on contractual certainty post-Brexit.

In the lead-up to the United Kingdom's exit from the European Union (Brexit) on March 29 (Exit Day), the agreement on the United Kingdom's withdrawal remains to be ratified by the UK Parliament. If ratification fails, this would result in a so-called "no-deal Brexit," meaning that the UK would leave the EU without having agreed on any transitional arrangements, and any firms or fund managers based in the European Economic Area (EEA) passporting their services or products into the UK would lose their permission to do so on Exit Day.

Given the continuing political uncertainty surrounding Brexit, CP19/2 sets out the FCA's proposals to implement the so-called financial services contracts regime (FSCR) so that EEA firms can fulfill their existing contractual obligations in the UK in the event of a no-deal Brexit. The FSCR works alongside the temporary permissions regime (TPR), allowing for the continuity of existing contracts for EEA firms that either do not submit notifications to enter the TPR, or are unsuccessful in securing, or do not apply for, full UK authorization through the TPR route (for more information on the TPR see the [January 11, 2019](#) edition of *Corporate & Financial Weekly Digest*).

The FSCR will apply automatically to such firms, allowing them, for a limited period, to continue to service UK contracts entered into before Exit Day or before exiting the TPR, provided that they meet the conditions of the FSCR. These conditions are set out in chapter 2 of CP19/2.

The FSCR will be time-limited depending on the type of regulated activity being performed. It will apply for a maximum of five years for all contracts except insurance contracts, for which there is a maximum of 15 years.

Unlike the TPR, the FSCR does not allow EEA firms to take on new business after Exit Day. Similarly, EEA-based managers, depositaries and trustees of UK-authorized funds cannot continue to manage or provide services to these funds after Exit Day under the FSCR. These firms and fund managers will need to make use of the TPR.

Comments can be made on CP19/2 until January 29. The FCA intends to provide feedback and publish final rules shortly before Exit Day.

CP19/2 is available [here](#).

## ESMA and EBA Publish Advice on Cryptoassets

On January 9, the European Securities and Markets Authority (ESMA) published advice addressed to the European Commission, the European Parliament and the Council of the EU on initial coin offerings (ICOs) and cryptoassets. On the same day, the European Banking Authority (EBA) also published advice on cryptoassets addressed to the European Commission.

### ESMA Advice

The ESMA advice clarifies the existing EU rules applicable to cryptoassets that qualify as financial instruments under the revised Markets in Financial Instruments Directive (MiFID II), and sets out its position on gaps and issues in the current regulatory framework.

ESMA notes that it has been working with national competent authorities on analyzing the different cryptoasset business models, risks and potential benefits they may introduce, and how they fit within the existing framework. Based on such work, ESMA has identified a number of concerns with the existing framework regarding cryptoassets. The gaps and issues identified by ESMA fall into two categories:

- for cryptoassets that qualify as financial instruments, as the existing rules were not designed with cryptoassets in mind, there are areas that require potential interpretation or reconsideration of specific requirements to allow for an effective application of existing regulations; and
- where assets do not qualify as financial instruments, the absence of applicable financial requirements leaves investors exposed to substantial risks. At a minimum, ESMA believes that anti-money laundering requirements should apply to all cryptoassets and activities involving cryptoassets and that there should also be appropriate risk disclosures in place so that consumers can be made aware of the potential risks prior to committing funds to cryptoassets.

As a number of the issues identified are beyond ESMA's scope, it believes that its advice allows the law-making EU institutions to consider possible ways in which the gaps and issues may be addressed and subjected to further analysis.

### EBA Advice

In its report, the EBA sets out the results of its assessment of the applicability and suitability of EU law to cryptoassets.

The EBA notes that the relatively low level of cryptoasset activity currently observed in the EU does not appear to give rise to implications for financial stability. However, activities involving cryptoassets typically fall outside the scope of EU banking, payments and electronic money regulation, and risks exist for consumers that are not addressed at the EU level. As a result of the development of national regulatory responses, divergences between Member States are starting to emerge, which presents risks to a level playing field between legal regimes. The EBA also believes that market developments point to the need for a further review of EU anti-money laundering legislation.

For these reasons, the EBA advises the Commission to carry out a comprehensive cost-benefit analysis, taking account of issues inside and outside the financial sector, to determine what, if any, action is required at the EU level. The EBA also advises the Commission to take account of the October 2018 recommendations of the Financial Action Task Force (FATF) regarding what the FATF calls "virtual asset" activities.

ESMA's advice is available [here](#) and the EBA's advice is available [here](#).

## ESMA Releases Latest Double Volume Cap Data Under MiFID II

On January 9, the European Securities and Markets Authority (ESMA) updated its public register with the latest set of double volume cap (DVC) data under the revised Markets in Financial Instruments Directive (MiFID II). The DVC public register was last updated in September 2018 (for more information, see the [September 14, 2018](#) edition of *Corporate & Financial Weekly Digest*).

ESMA has identified a total of 53 breaches during the period from December 1, 2017 to November 30, 2018. Instruments in breach of the caps will be suspended from being traded under the waivers from January 14 until July 13. Due to corrected data received by ESMA, two instruments previously identified as being in breach were incorrectly identified, and the relevant suspensions of trading under the waivers should be lifted.

As of January 9, a total of 625 instruments have been suspended.

ESMA's announcement in relation to the updated DVC register is available [here](#).

### **ESMA Publishes Updated Q&As on MiFID II and MiFIR Commodity Derivatives Topics**

On January 4, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers document (Q&As) on commodity derivative topics under the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR). This follows the last updated version of its Q&As, which ESMA published on October 2, 2018 (for more information, see the [October 12, 2018](#) edition of *Corporate & Financial Weekly Digest*).

In the latest update, Q&A 1 under section 1 clarifies the correct application of the field “price multiplier” when reporting electricity contracts, in order to mitigate the risk of different contracts receiving the same international securities identification number (otherwise known as the ISIN).

The updated Q&As, along with an overview of them, are available [here](#).

### **ESMA Publishes Updates Q&As on MiFID II and MiFIR Transparency Topics**

On January 4, the European Securities and Markets Authority (ESMA) published an updated version of its questions and answers document (Q&As) on transparency topics under the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR). This follows the last updated version of its Q&As, which ESMA published on November 14, 2018 (for more information, see the [November 16, 2018](#) edition of *Corporate & Financial Weekly Digest* ).

The new and modified Q&As clarify the following topics:

1. publication of request for market data transactions (under Q&A 4, section 3);
2. the default transparency regime for equity instruments (under Q&A 3, section 3); and
3. default large in scale and size-specific-to-the-instrument transparency thresholds for bonds (under Q&A 15, section 4).

The updated Q&As, along with an overview of them, are available [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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BREXIT/UK/EU DEVELOPMENTS

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