SHEARMAN & STERLING LLP

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP
NEWSLETTER

DECEMBER 20, 2016
ISSUE 21/2016

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 Federal Reserve Board Issues Statement of Policy Regarding Illiquid Fund Investments Under the Volcker Rule

On December 12, 2016, the US Board of Governors of the Federal Reserve System issued a statement of policy regarding how banking entities may seek an extension to conform their investments in certain illiquid hedge funds and private equity funds (covered funds) to the requirements of section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Volcker Rule. As noted below, any such extension requests must be submitted by January 21, 2017.

The Volcker Rule provisions of the Dodd-Frank Act permits the Federal Reserve Board, upon an application by a banking entity, to provide up to an additional five years to conform investments in certain legacy illiquid covered funds where the banking entity had a contractual commitment to invest in the fund as of May 1, 2010. The five-year extension for certain legacy illiquid covered funds is the last conformance period extension that the Federal Reserve Board is authorized to provide banking entities under the statute.

The Federal Reserve Board expects that illiquid funds will generally qualify for extensions. However, extensions may not be granted where the banking entity has not demonstrated meaningful progress to conform or divest its illiquid covered funds, has a deficient compliance program under the Volcker Rule or where the Federal Reserve Board has concerns about evasion.

According to the guidelines adopted by the Federal Reserve Board, firms seeking an extension should submit information including: (i) details about the covered funds for which an extension is requested; (ii) a certification that each covered fund meets the definition of illiquid covered fund; (iii) a description of the specific efforts made to divest or conform the illiquid covered funds; and (iv) the length of the requested extension and the plan to divest or conform each illiquid covered fund within the requested extension period. Such requests must be submitted 180 days in advance of the end of the current conformance date of July 21, 2017, for legacy covered funds (thus, January 21, 2017).

The Federal Reserve Board consulted with staffs of the other agencies charged with enforcing the requirements of section 619, and the agencies plan to administer their oversight of banking entities under their respective jurisdictions in accordance with the Federal Reserve Board's conformance rule and the related guidance set forth in a Supervision and Regulation Letter.

The statement of policy is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161212b1.pdf; and the related guidance is available at: https://www.federalreserve.gov/bankinforeg/srletters/sr1618.pdf.

US Federal Banking Agencies Finalize Rule Expanding Examination Cycle for Small Insured Depository Institutions and US Branches and Agencies of Foreign Banks

On December 12, 2016, the US Federal Deposit Insurance Corporation, the Federal Reserve Board and the Office of the Comptroller of the Currency issued interagency final rules that increase the number of small banks and savings associations eligible for an 18-month examination cycle rather than a 12-month cycle. The purpose of the rules is to reduce regulatory compliance costs for smaller institutions, while maintaining safety and soundness protections.

Under the final rules, qualifying well-capitalized and well-managed banks and savings associations with less than $1 billion in total assets are eligible for an 18-month examination cycle. Previously, only firms with less than $500 million in total assets were eligible for the extended examination cycle. Qualifying well-capitalized and well-managed US branches and agencies of foreign banks with less than $1 billion in total assets are also eligible.

These rules have been in effect since February 29, 2016, pursuant to the interim final rules previously adopted by the agencies. After soliciting comment on the interim final rules, the agencies have re-issued them as final rules. The final rules are identical to the interim final rules.

The final rules are available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161212a1.pdf.

US Federal Reserve Board Approves Technical Amendments to GSIB Surcharge Rule and Proposes Interim Reporting Rule

On December 9, 2016, the US Federal Reserve announced the approval of technical amendments to its rule regarding risk-based capital surcharges for US-based global systemically important bank holding companies (GSIB surcharge rule), requiring those firms to hold additional amounts of risk-based capital to avoid restrictions on capital distributions and discretionary bonus payments. The changes would not materially alter the underlying rule approved by the Federal Reserve Board in July 2015.

The amendments are being adopted without change from the proposal released for comment earlier this year. The amendments would clarify that GSIBs: (i) must continue to calculate their surcharges using year-end data while reporting the underlying data on a quarterly basis; and (ii) should scale the values of their surcharge scores to billions of dollars when computing.

On the same day, the US Federal Reserve Board issued an interim final rule that extends the amount of time certain firms will have to complete Schedule G of the Banking Organization Systemic Risk Report (FR Y-15). The FR Y-15 reporting form collects systemic risk data from US bank holding companies, covered savings and loan holding companies and US intermediate holding companies of foreign banking organizations with total consolidated assets of $50 billion or more.

The extension applies to firms that have less than $10 trillion in assets under custody and less than $700 billion in total consolidated assets. Firms with less than $10 trillion in assets under custody, $250 billion or more in total consolidated assets (but less than $700 billion in total consolidated assets) or $10 billion or more in on-balance-sheet foreign exposure have been granted a one-year extension, until December 31, 2017, to begin filing Schedule G with the FR Y-15 reports. Firms with less than $10 trillion in assets under custody, less than $250 billion in assets and less than $10 billion in on-balance-sheet foreign exposures have until June 2018 to begin submitting Schedule G.

Comments on the interim final rule must be received within 60 days following publication in the Federal Register.

The final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161209b2.pdf; and the interim final rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161209b1.pdf.

US Federal Reserve Board Issues Proposal to Apply Existing Rating System for Bank and Savings and Loan Holding Companies

On December 9, 2016, the US Federal Reserve Board invited comment on a proposal to fully apply the Federal Reserve Board's existing rating system for bank holding companies to savings and loan holding companies.

The Dodd-Frank Act transferred responsibility for the regulation and supervision of savings and loan holding companies to the Federal Reserve Board, effective July 2011. Since then, the Federal Reserve Board has applied its rating system to savings and loan holding companies on an "indicative" basis that describes how the savings and loan holding company would be rated. However, the assignment of an unsatisfactory indicative rating has not automatically triggered supervisory action.

The Federal Reserve Board's rating system is in part used to determine the safety and soundness of a financial institution, as well as potential supervisory responses. Fully applying the rating system to both bank holding companies and savings and loan holding companies will help ensure consistent standards and supervision.

The proposal would fully apply the rating system to most savings and loan holding companies supervised by the Federal Reserve Board. However, it would not apply to savings and loan holding companies engaged in significant insurance or commercial activities. These firms would instead continue to receive indicative ratings.

Comments on the proposed rule must be received no later than February 13, 2017.

The proposed rule is available at: https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20161209a1.pdf.

US Federal Reserve Board Finalizes Revisions to Form FR Y-7 Filed by Foreign Banking Organizations

On December 7, 2016, the US Federal Reserve Board published a notice in the Federal Register that it has finalized its proposed revisions to Form FR Y-7Q implementing the home country capital adequacy requirements prescribed in Sections 252.143(b) and 252.154(b) of Regulation YY. These revisions are effective December 31, 2016, except for the three new line items regarding a foreign banking organization's (FBO) leverage ratio, which are effective March 31, 2018.

The Federal Reserve Board noted that the submission of the information required on Form FR Y-7Q constitutes compliance with both the home country capital adequacy reporting and the certification requirements of Regulation YY. Accordingly, commencing with the FR Y-7Q filings as of December 31, 2016, the Federal Reserve Board will treat each quarterly filing as a certification of the reporting FBO's home country capital adequacy. The Federal Reserve Board also eliminated the proposed line items for Pillar II buffers and any "other" applicable capital buffer. However, it retained the line item for reporting home country GSIB buffers. Regarding confidentiality, the Federal Reserve Board considers all the required information to be publicly available, but will consider, on a case-by-case basis, requests by individual FBOs for confidential treatment of specific line items.

The Federal Register notice is available at: https://www.gpo.gov/fdsys/pkg/FR-2016-12-07/pdf/2016-29329.pdf.

Federal Reserve Board Governor Daniel Tarullo Discusses Financial Regulation Since the Crisis

On December 2, 2016, Federal Reserve Board Governor Tarullo gave a speech defending post-financial crisis efforts to strengthen regulation governing the financial system. Governor Tarullo also criticized recent Republican legislative regulatory reform proposals, including the Financial CHOICE Act's proposal to raise the leverage ratio of banks to 10% in return for relief from many other prudential requirements, including risk-based capital requirements.

Governor Tarullo's remarks are available at: https://www.federalreserve.gov/newsevents/speech/tarullo20161202a.htm.

US House of Representatives Passes Legislation Eliminating $50 Billion Asset Threshold for SIFI Designation

On December 1, 2016, the US House of Representatives passed a bill (H.R. 6392) that would replace the current supervisory framework under the Dodd-Frank Act that automatically subjects all bank holding companies with $50 billion or more in total consolidated assets to enhanced prudential standards with a system that would authorize the Financial Stability Oversight Council to designate companies on a case-by-case basis if the FSOC makes a final determination that material financial distress at the bank holding company, or the nature, scope, size, scale, concentration, interconnectedness or mix of its activities could threaten the financial stability of the United States. G-SIBs, however, would be treated as if such a determination had been made. In a statement issued in support of the bill, Representative Warren Davidson (R-OH) stated that the bill "prevent[s] the Fed and Treasury from Blindly implementing new regulations proposed by an international entity, whether coming from the [BCBS] or unelected bureaucrats on the Financial Stability Board." By contrast, Representative Maxine Waters (D-CA) called the legislation the "first step in the Trump agenda to deregulate Wall St."

The text of HR 6392 is available at: https://www.congress.gov/bill/114th-congress/house-bill/6392.

US Comptroller of the Currency Thomas Curry Emphasizes the Need for Strong Capital and Liquidity

On November 30, 2016, Thomas Curry, Comptroller of the Currency provided remarks at The Clearing House's Annual Conference, focusing on the value of strong capital, the need for liquidity, and the importance of effective supervision.

Curry began by highlighting that increased capital requirements, and the leverage ratio requirements that supplement these capital standards, have led to large bank holding companies being projected to remain well-capitalized under the most severe stress test scenario. He argued against a reduction in capital and leverage requirements. He similarly emphasized the importance of strong liquidity requirements that have been implemented since the financial crisis and noted that US banks have higher revenues and higher profits than their European counterparts under the new regulations.

Curry then discussed the importance of "holistic" supervision, arguing that regulators and banks must continue to improve both metrics and "soft" standards of performance. Curry mentioned a trend in some banks to separate the Chairmanship of the Board from the CEO position and noted that the OCC is considering whether it would make sense for all, or all of the largest, federally supervised banks to make the same change. Curry concluded by highlighting the performance of community banks and smaller institutions alongside large institutions and noting the progress made since 2008.

Comptroller Curry's remarks are available at: https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-149.pdf

Counselor to the US Treasury Secretary, Antonio Weiss, Argues for the Preservation of the FSOC

On November 29, 2016, Antonio Weiss, Counselor to the US Treasury Secretary, argued that the FSOC has become a "critical nerve center during episodes of market volatility or stress," providing a forum to assess system-wide risks, which was missing during the financial crisis. In the speech, Weiss stated that the establishment of FSOC has improved the ability of regulators to share information and collaborate in a way that no single regulator can do on its own.

The text of Weiss's remarks is available at: https://www.treasury.gov/press-center/press-releases/Pages/jl0674.aspx.

US Board of Governors of the Federal Reserve System Finalizes Dividend Rule

On November 23, 2016, the US Federal Reserve Board issued a final rule, amending Regulation I to implement provisions of the Fixing America's Surface Transportation (FAST) Act, a five-year bill that reauthorized, at then-current levels, the core programs providing federal transportation funding to the states. The final rule adopts substantively all of the provisions of the interim final rule issued in February of this year. The rule will reduce the dividend rate for banks with total assets of more than $10 billion to the lesser of 6% or the most recent 10-year Treasury auction rate prior to the dividend payment. The rule also adjusts the treatment of accrued dividends when a Federal Reserve Bank issues or cancels capital stock owned by a large member bank.

The text of the rule is available at: https://www.gpo.gov/fdsys/pkg/FR-2016-11-23/pdf/2016-28231.pdf.

US Federal Reserve Board Announces Broadened Post-Employment Restrictions on Senior Examiners and Officers

On November 18, 2016, the US Federal Reserve Board announced that it was broadening the scope of post-employment restrictions applicable to senior examiners and officers of Federal Reserve Banks. The revised rule broadens the one-year bar on accepting paid work from a financial institution from applying to only examiners who are "central points of contacts" (CPCs) to include deputy CPCs, senior supervisory officers (SSOs), deputy SSOs, enterprise risk officers and supervisory team leaders. The new policy also prohibits former Federal Reserve Bank officers from representing third parties before current Federal Reserve employees for one year after leaving their position, and imposes a one-year ban on current employees discussing official business with these former officers.

The restriction on former officers became effective on December 5, 2016, and the restriction on senior examiner employment will become effective on January 2, 2017.

The press release is available at: https://www.federalreserve.gov/newsevents/press/bcreg/20161118a.htm.

US Representative Hensarling Calls for Repeal of Dodd-Frank

On November 16, 2016, Jeb Hensarling (R-TX), Chairman of the House Financial Services Committee, gave a speech to the Exchequer Club laying out a potential financial regulatory agenda for the Trump Administration and Congressional Republicans to pursue. He began by calling for thwarting the Department of Labor's fiduciary rule, as well as preventing the Consumer Financial Protection Bureau from regulating small dollar, "payday" loans.

Hensarling called on Congress to repeal the Dodd-Frank Act and replace it with "The Financial Choice Act." He cited the proposed Act's requirements that new financial regulation pass a cost-benefit test; its mandate for the budgets of all the financial regulatory agencies (except for the Federal Reserve Board's conduct of monetary policy) to come into the Congressional budgeting process; and its proposal to replace regulatory agencies headed by a single director — the CFPB, OCC and FHFA — with bipartisan commissions. He also called for the repeal of the Chevron doctrine and for a new subchapter of the Bankruptcy Code to be added to address the failure of a complex financial institution (in lieu of the Orderly Liquidation Authority under the Dodd-Frank Act).

Hensarling then praised the "PATH Act," a Republican proposal reliant on private capital to reshape the housing finance system. The act would lessen government's role in housing finance, remove "artificial" barriers to private capital and provide "clear [and] transparent" rules to market participants and disclosure to consumers. He concluded by highlighting what he presented as the US's "unsustainable" national debt and calling for bipartisan effort to negotiate the reforms he discussed.

Congressman Hensarling's remarks are available at: http://financialservices.house.gov/blog/?postid=401199.

US Federal Deposit Insurance Corporation Board Approves Final Rule Establishing Recordkeeping Requirements for Deposit Accounts by Large Insured Institutions

On November 15, 2015, the Board of the FDIC approved a final rule establishing recordkeeping requirements for FDIC-insured institutions with more than two million deposit accounts. Such institutions are required to maintain complete and accurate data on each depositor and to implement information technology systems capable of calculating the amount of insured money for depositors within 24 hours of a failure. The final rule also established alternative requirements for certain deposit accounts with "pass through" deposit insurance coverage, including trust and brokered deposits, allowing for institutions to process these accounts during a longer time period after a failure. The rule will become effective on April 1, 2017.

The FDIC press release is available at: https://www.fdic.gov/news/news/press/2016/pr16101.html; the final rule is available at: https://www.fdic.gov/news/news/press/2016/pr16101a.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

US Government Accountability Office Reports on Limitations in Federal Reserve Stress Tests

On November 15, 2016, the Government Accountability Office released a report highlighting limitations in the Federal Reserve stress testing programs. The GAO report noted three specific areas that could hinder the effectiveness of stress tests: qualitative assessment disclosure and communication, scenario design and model risk management. Specifically, the GAO faulted the Federal Reserve for not disclosing full information on its qualitative assessment approach, posing challenges to companies that must meet assessment goals and for not analyzing whether the severe scenario used for stress testing adequately reflects a full range of possible outcomes in the event of a crisis. The GAO report makes 15 specific recommendations, which it reported that the Federal Reserve "generally agreed" with and noted specific ongoing and future efforts to implement these recommendations.

The GAO press release is available at: http://www.gao.gov/products/GAO-17-48; the report is available at: http://www.gao.gov/assets/690/681020.pdf.

EU Extends Transitional Measures for Exposures to CCPs Again

On December 10, 2016, a Commission Implementing Regulation on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in the Capital Requirements Regulation and European Market Infrastructure Regulation was published in the Official Journal of the European Union. The authorization process for existing CCPs established in the European Union is complete but there are still third-country CCPs, notably some based in the US, that are awaiting recognition status. Without an extension of the transitional periods, banks and investment firms in the EU would need to increase their own funds requirements for their exposures to those CCPs that are not yet recognized. The implementing Regulation extends the transitional period by an additional six months to June 15, 2017.

The recent proposals to amend the CRR published by the European Commission include an amendment to these transitional provisions. The proposed amendment would remove the need for the European Commission to continuously extend the transitional period by basing the transitional deadline instead on the timing of an application for recognition by a third country CCP.

The Implementing Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF /?uri=CELEX:32016R2227&from=EN&_sm_au_=iVVTFktM4J1qvvjr.

European Commission Proposes Draft "CRD5" Among Various EU Banking Sector Legislative Amendments

On November 23, 2016, the European Commission published a package of proposed legislative amendments in relation to the Bank Recovery and Resolution Directive, the Single Resolution Mechanism Regulation, the Capital Requirements Regulation and the Capital Requirements Directive. The amendments aim in part to introduce some of the revised global prudential standards from latest FSB/Basel developments, to apply a more proportionate approach to regulating banks and investment firms depending on their size and complexity and to remove some of the options and discretions that are currently available to EU Member States.

The changes to CRR and CRD IV include a new requirement on non-EU G-SIBs (or non-EU banking groups that have EU firms with total assets of at least EUR 30 billion) that have two or more EU firms to establish an EU intermediate holding company. This controversial proposal does not square well with US or other third country bank structural laws nor will it be reflected in banks' existing resolution and recovery plans, and so will doubtless be a contentious issue as it is developed further.

Other amendments include:

i. introducing a binding leverage ratio of 3% of Tier 1 capital which firms must meet in addition to their risk-based capital requirements as well as other adjustments to the ratio which will allow firms to reduce the leverage ratio exposure measure in certain circumstances;

ii. introducing a binding net stable funding ratio of 100% and harmonized NSFR reporting requirements;

iii. implementing Basel Committee on Banking Supervision standards in relation to equity investment in funds, counterparty credit risk and exposures to CCPs;

iv. amendments to the rules on capital requirements for market risk in the trading book. These are mostly in line with the Basel Committee framework but with some differences for EU specificities such as simple, transparent and standardized securitizations and covered bonds and to allow the requirement to be phased-in over a period of three years after the proposed legislation enters into force;

v. amending the capital base that can count towards calculation of the large exposures limit so that only Tier 1 capital counts and introducing a lower limit of 15% for G-SIBs exposures to other G-SIBs;

vi. imposing the use of SA-CCR methods for determining exposures to OTC derivative transactions; and

vii. amending the rules around the use of Pillar 2 additional requirements to harmonize approaches adopted across the EU.

On the recovery and resolution side, the Commission is proposing to, amongst other things, amend the ranking of unsecured debt instruments in the insolvency hierarchy for the purpose of bank resolution and insolvency proceedings and to implement the global total loss absorbing capacity (TLAC) standard into EU legislation for global systemically important banks in the EU by introducing a minimum Pillar 1 MREL requirement applicable only to EU G-SIBs. Resolution entities that are part of EU G-SIBs will therefore be subject to an external Pillar 1 MREL by 2022 of the greater of 18% risk-weighted assets and 6.75% of the leverage ratio exposure measure.

An EU G-SIB may also be subject to a Pillar 2 add-on requirement, if its resolution authority assesses this to be justified. In addition, the Commission is seeking to introduce a power for national regulators to waive the requirements on contractual recognition of bail-in for contracts governed by the laws of a third country [for third country market infrastructure and certain other troublesome situations] and to give resolution authorities the power to impose temporary stays on termination rights. Most of these changes will be made through amendments to BRRD and the SRM Regulation. However, the implementation of TLAC will mostly be done through CRR amendments. CRR is directly applicable throughout the EU, which means that EU Member States will have little flexibility to adopt different approaches to implementing the EU version of TLAC.

The proposals are now subject to approval by the European Parliament and the Council of the European Union. The Commission is proposing that the changes to the creditor hierarchy would apply from July 2017.

The Commission intends the other revisions to be transposed by Member States 12 months after the date of entry into force of the revised BRRD and the requirements to apply six months after that transposition date. Implementation of any of the proposed changes will depend on the legislative process.

The Proposal to amend the BRRD on creditor hierarchy is available at: http://ec.europa.eu/finance/bank/docs/crisis-management/161123-proposal-directive-unsecured-debt-instruments_en.pdf?_sm_au_=iVVRnsFNZRbjLHb6; the other Proposal to amend the BRRD is available at: http://ec.europa.eu/finance/bank/docs/crisis-management/161123-proposal-directive-recapitalisation-capacity_en.pdf; the Proposal to amend the SRM is available at: http://ec.europa.eu/finance/general-policy/ docs/banking-union/single-resolution-mechanism/161123-proposal-regulation_en.pdf; the Proposal to amend the CRR is available at: http://ec.europa.eu/transparency/regdoc/rep /1/2016/EN/COM-2016-850-F1-EN-MAIN.PDF; and the Proposal to amend the CRD is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-854-F1-EN-MAIN.PDF.

Final Draft EU Standards on the Assessment Methodology for the Use of Internal Models Published

On November 22, 2016, the European Banking Authority published a Report and the final draft Regulatory Technical Standards under the Capital Requirements Regulation on the assessment methodology national regulators should use when a firm applies for approval to calculate their own funds requirements using their internal models for one or more risk categories. In particular, the final draft RTS cover: (i) the methodology for national regulators to assess whether a firm complies with the requirements to use an Internal Model Approach for market risk; and (ii) the conditions under which national regulators assess the significance of the positions that will be included in the scope of an IMA. When finalizing the final draft RTS, the EBA took into account, to the extent possible under the existing CRR, the Fundamental Review of the Trading Book that the Basel Committee published in January 2016. The final draft RTS have been submitted to the European Commission for consideration.

The final draft RTS is available at: http://www.eba.europa.eu/documents/10180/1669525/Final+draft+RTS +on+the+IMA+assessment+methodology+%26+significant+shares+%28EBA-RTS-2016-07%29.pdf.

European Banking Authority Responds to Commission Request for Further Information on Application of Proportionality to Remuneration Provisions in the Capital Requirements Directive

On November 21, 2016, the EBA published a response to the European Commission’s request for further information on the EBA’s Opinion on the application of the principle of proportionality to remuneration provisions in the CRD. On December 21, 2015, the EBA published its first Opinion, recommending a possible set of exemptions from some of the remuneration principles, specifically the variable elements of remuneration. The EBA's proposed amendments included: (i) the application of deferral arrangements; (ii) the pay out in instruments for small and non-complex institutions; and (iii) for identified staff that receive only a low amount of variable remuneration when specific criteria are met. The Commission requested further information from the EBA through a letter dated April 21, 2016 on the issue of proportionality. The EBA responded on May 27, 2016, noting the scope of its then-planned analysis and the limitations on such a response given the timing and available data resources.

The EBA found that all but five Member States allow for waivers in the areas of remuneration, that most Member States permit the application of waivers through thresholds based on balance total or by making case-by-case assessments. The EBA concluded that the extent to which banks and identified staff benefit from waivers differs significantly across the EU.

The Commission also sought further information on the EBA’s proposed exemptions for banks and identified staff as well as for staff who receive low levels of variable remuneration. The EBA outlined its findings on the potential impact of waivers at different thresholds, based on the balance sheet total of EUR 1.5 bn, EUR 5.0 bn and EUR 10.0 bn. The EBA found that, of the banks located in the EEA, around 75% to 90% of such firms, 35% to 60% of the identified staff and 3% to 15% of the market share would be able to benefit from waivers under those thresholds. This would be in addition to staff that could benefit from waivers based on low levels of remuneration. The EBA also provided further analysis on the use of share-linked instruments, recommending that listed firms should be able to use share-linked instruments because they have the same effect as shares when they reflect exactly the value of shares at all times. This approach is already taken in many Member States.

The EBA's response is available at: http://www.eba.europa.eu/documents/10180/1667706/EBA+Opinion+on+the+application+ of+the+principle+of+proportionality+to+the+remuneration+provisions+in+Dir+2013+36+EU+%28EBA-2016-Op-20%29.pdf?_sm_au_=iVVWRktM4J8JWMTH ; the EBA's Opinion on the application of the principle of proportionality to the remuneration provisions in CRD is available at: https://www.eba.europa.eu/documents/10180/983359/EBA-Op- 2015-25+Opinion+on+the+Application+of+Proportionality.pdf.

European Banking Authority Harmonizes Approach to Credit Risk for Exposures to Public Sector Entities

On November 18, 2016, the EBA published a list of public sector entities that may be treated as regional governments, local authorities or central governments when firms are calculating their capital requirements to EU public sector entities for credit risk purposes under the Capital Requirements Regulation. Exposures to the public sector entities that are included in the EBA's list will attract the same risk weight as the respective regional governments, local authorities or central governments. The EBA has compiled the list on its own initiative to enhance harmonization across the EU in this area.

The EBA's list is available at: http://www.eba.europa.eu/-/eba-publishes-list-of-public-sector-entities-for-the-calculation-of-capital-requirements.

European Banking Authority Consults on Proposals to Reintroduce the Maturity Ladder for Liquidity Reporting

On November 16, 2016, the EBA published for consultation draft amending Implementing Technical Standards to amend the current ITS on supervisory reporting of firms as amended by the ITS on additional monitoring metrics for liquidity reporting. Under the Capital Requirements Regulation, banks are subject to liquidity reporting requirements. The ITS on supervisory reporting include provisions on a firm's liquidity reporting requirements. Additional monitoring metrics for liquidity were added to the ITS in March 2016. The EBA's final draft ITS on those additional monitoring metrics included a maturity ladder templates and instructions which were removed by the European Commission before it adopted the ITS. The European Commission has since requested the EBA to update the maturity ladder in line with the detailed information of liquid assets as set out in the Delegated Act on the Liquidity Coverage Ratio. The EBA's proposed amending ITS are mostly concerned with reintroducing a maturity ladder in line with the reporting requirements provided for in the LCR Delegated Act. The EBA is due to submit the final revised draft ITS in March/April 2017. It is expected that the revised reporting requirements would apply from March 2018. The consultation closes on January 2, 2016.

The consultation paper is available: http://www.eba.europa.eu/documents/10180/1661766/Consultation+Paper+on+amending+ITS+on+AMM+%28EBA-CP-2016-22%29.pdf.

Guidelines on the Assessment of Institutional Protection Schemes Published

On November 15, 2016, Guidelines laying down principles for the coordination of the assessment and monitoring by the European Central Bank and regulators of institutional protection schemes pursuant to the Capital Requirements Regulation was published in the Official Journal of the European Union. The Guidelines are applicable to Single Supervisory Mechanism regulators, which includes the ECB and regulators of the participating states. The Guidelines relate to the assessment of IPSs for the purpose of granting prudential permissions and waivers to IPS members pursuant to the CRR and to the monitoring of IPSs that have been recognized for prudential purposes. The Guidelines apply where member institutions simultaneously submit their application for prudential waivers. An IPS is a contractual or statutory liability arrangement that protects its member institutions and ensures that they have the liquidity and solvency needed to avoid bankruptcy where necessary. The CRR requires that regulators must approve and monitor the adequacy of the IPS's systems for the monitoring and classification of risk and further requires that the IPS conducts its own review. Regulators may allow for certain derogations by an IPS member from certain CRR requirements. The Guidelines outline the process for regulators in making decisions relating to members of the same IPS that consist of both significant and less significant credit institutions. The purpose of the Guidelines is to ensure that regulators apply the same criteria when assessing IPS applications from less significant institutions and consistently monitor ongoing legal requirements. SSM regulators must comply with the Guidelines by December 2, 2016.

The AIPSP's Guidelines are available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016O00037&from=EN&_sm_au_=iVVRnsFNZRbjLHb6.

European Banking Authority Publishes Views From Impact Assessment on Implementation of IFRS 9

On November 10, 2016, the EBA published a Report outlining observations from its impact assessment on the implementation of International Financial Reporting Standard 9. The report analyzes the estimated impact of implementing IFRS 9 on firms and assesses the interaction between IFRS 9 and other prudential requirements. The impact assessment was launched in January 2016 on a sample of approximately 50 firms. 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 from 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 EBA is proposing further steps to assist in monitoring the implementation of IFRS 9, including a second exercise on the impact of IFRS 9, 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, including 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.

European Securities and Markets Authority Makes Public Statement on Implementing IFRS 9

On November 10, 2016, the European Securities and Markets Authority issued a public Statement on the implementation of IFRS 9. The purpose of the Statement is to promote consistent application of European securities and markets legislation, and more specifically, International Financial Reporting Standards. ESMA notes that issuers of securities admitted to trading on regulated markets and their auditors should take the public statement into consideration during the implementation of IFRS 9; in particular, when disclosing and auditing its effects on such financial statements. ESMA is of the view that in most cases it would be appropriate to provide disclosures about changes in accounting policies and impacts on an entity's financial statements in the period of initial application already prior to the entity's 2017 annual financial reports. ESMA highlights that IFRS 9 is expected to have significant impacts on firms and, in particular, on credit institutions, due to the new classification for financial assets as well as implementation of the new impairment model based on the ECL. ESMA's Statement provides an illustrative timeline for implementation and a non-exhaustive list of good practices of disclosure when issuers (in general, and not limited to financial institutions) expect the application of IFRS 9 to have a significant impact on their financial statements. ESMA notes that each individual issuer should take into account materiality and its individual circumstances to ensure that relevant and transparent financial information is provided to users of its financial statements.

ESMA's Statement is available at: https://www.esma.europa.eu/sites/default/files/library/2016-1563_public_statement-issues_on_implementation_of_ifrs_9.pdf.

UK Prudential Regulation Authority Publishes its Final Approach to Implementing the Systemic Risk Buffer

On December 5, 2016, the Prudential Regulation Authority published a Statement of Policy setting out its approach to the implementation of the systemic risk buffer. The SRB is used to prevent and mitigate long term non-cyclical macro-prudential or systemic risks not covered by the Capital Requirements Regulation. It is a firm-specific buffer based on a firm's risk weighted exposures and must be met with Common Equity Tier 1 capital. The Statement of Policy is relevant to ring-fenced bodies under the Financial Services and Markets Act 2000 and large building societies that hold more than £25 billion in deposits. These are jointly referred to as "SRB institutions." The UK Independent Commission on Banking recommended that the UK's systemically important SRB institutions be held to a higher capital standard. In addition to these recommendations, the UK legislation implementing the systemic risk buffer requires that the PRA apply the Financial Policy Committee framework as of January 1, 2019. The FPC's framework for the systemic risk buffer was published in May 2016.

The PRA's Statement of Policy confirms that: (i) the PRA will, in the exercise of sound supervisory judgement, only deviate from the SRB rates derived from the FPC framework in exceptional cases; (ii) for building societies in scope of the framework, the applicable basis of the framework will be the group consolidated basis for building societies that are the parents of consolidation groups and the individual basis for all others; (iii) the PRA expects to set the initial SRB rates of each SRB institution in early 2019 and that those rates will apply three months after being set, but the timeframe may be adjusted where appropriate; and (iv) following the application of the initial SRB rates, rates will be set and announced annually and will apply in the second year following the calendar year in which they are set. The PRA will review the Statement of Policy in 2018 and then subsequently at least every two years.

The Statement of Policy on implementation of the systemic risk buffer is available at: http://www.bankofengland.co.uk/pra/Documents/publications/sop/2016/srbapproach.pdf.

2016 List of G-SIBs Published

On November 21, 2016, the FSB published an updated list of G-SIBs. The 2016 list of G-SIBs includes the same banks as those in the 2015 list. However, some banks have moved to a higher or lower bucket due to improved data quality, changes in underlying activity and/or the use of supervisory judgement.

The 2016 list of G-SIBs is available at: http://www.fsb.org/wp-content/uploads/2016-list-of-global-systemically-important-banks-G-SIBs.pdf.

Conduct & Culture

US Senior Deputy Comptroller Grovetta Gardineer Speaks to the CRA and Fair Lending Colloquium

On November 15, 2016, Grovetta Gardineer, Senior Deputy Comptroller for Compliance and Community Affairs, spoke to the CRA and Fair Lending Colloquium about the role a "healthy culture" plays at regulated financial institutions. She called the Dodd-Frank reforms the process of establishing a "new normal," warning institutions they cannot return to pre-crisis modes of operation. She highlighted compliance culture as a key element to a healthy institutional culture, noting OCC efforts to improve compliance supervision. She also noted a focus on existing and emerging risks in the fair lending and CRA spaces for the OCC.

Senior Deputy Comptroller Gardineer's remarks are available at: https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-144.pdf.

Consumer Protection

US Consumer Financial Protection Bureau Issues Bulletin on Detecting and Preventing Consumer Harm from Production Incentives

On November 28, 2016, the US Consumer Financial Protection Bureau issued a bulletin warning banks that creating incentives for employees and service providers to meet sales and other business goals can lead to illegal sales practices such as unauthorized account openings, deceptive sales tactics and steering consumers into less favorable products, all practices which may cause consumer harm. In addition, the bulletin outlines the CFPB's expectation that institutions that choose to utilize incentives should institute effective controls for the risks that these incentives may present. Most importantly, the CFPB emphasizes the need for a robust compliance management system, which includes board of director and management oversight, training, monitoring and independent audits.

The CFPB bulletin is available at: http://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/cfpb-compliance-bulletin-2016-03-detecting-and-preventing-consumer-harm-from-production-incentives/.

US Consumer Financial Protection Bureau Announces Inquiry into Consumer Challenges in Using and Securely Sharing Digital Financial Records

On November 17, 2016, the CFPB launched an inquiry into the challenges consumers face in accessing, using and securely sharing financial records. The CFPB is asking the public to report how much choice they are given about the use of their records, how secure it is to share them and to what extent they have control over them. The CFPB's release noted that the Dodd-Frank Act gave consumers rights to electronically access their financial records, with the CFPB having rulemaking authority over the area.

The comment period will end on February 21, 2017.

The CFPB's press release is available at: http://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-challenges-consumers-face-using-and-securely-sharing-access-their-digital-financial-records/; and the Request for Information is available at: https://www.federalregister.gov/documents/2016/11/22/2016-28086/request-for-information-regarding-consumer-access-to-financial-records.

UK Government Consults on Imposing Financial Penalties for Breach of Financial Sanctions

On December 1, 2016, the Office of Financial Sanctions Implementation (OFSI), which is a part of HM Treasury, published the UK Government's proposed approach to imposing financial penalties for breach of financial sanctions. OFSI was established earlier in 2016 and has responsibility for ensuring that sanctions are "properly understood, implemented and enforced in the UK." Financial sanctions may include prohibitions on the transfer of funds to a sanctioned country, freezing of the assets of a government, corporate entities or citizens of a particular country or targeted freezing of assets of individuals or legal entities.

Provisions in the Policing and Crime Bill, currently going through Parliament, outline new administrative penalties, civil monetary penalties and an increase in the maximum custodial sentence for breaching financial sanctions to seven years on conviction on indictment (or six months' imprisonment on summary conviction) for breach of financial sanctions. OFSI is seeking feedback on its proposed Guidance on the circumstances in which it may consider that a monetary penalty is suitable and how it will set the penalty amount as well as the process for imposing a penalty and the circumstances in which details of any penalty may be published. The consultation closes on January 26, 2017. OFSI has stated that either interim or final Guidance will be published before the power to impose penalties comes into effect in April 2017. The proposed Guidance is based on the current version of the Bill and may need to be amended as appropriate once the final legislation is published.

The consultation paper is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574669/Monetary_sanctions_consultation_final.pdf.

UK Regulator Launches Call for Input on Review of High-Cost Credit

On November 29, 2016, the Financial Conduct Authority launched a call for input into its review of high-cost credit, including the high-cost of short-term credit (HCSTC) price caps. The FCA took over regulation of consumer credit in April 2014. High-cost credit includes payday loans, home-collected credit, catalogue credit, some rent-to-own, pawn-broking, guarantor and logbook loans. As part of its policy to address the risk of consumer harm from such products, the FCA has introduced a HCSTC cap and new regulation for HCSTC lenders. The FCA has committed to reviewing the HCSTC price cap while also reviewing high-cost products as a whole to determine whether further policy intervention is required and if so, whether a more consistent approach is necessary. The FCA identifies overdrafts as a priority area for consumer protection and regulation. The FCA is seeking responses on issues with regard to the competition and provision of substitute or alternative high-cost credit products to overdrafts. The HCSTC price cap came into force on January 2, 2015. The FCA is seeking to assess whether there is evidence to suggest that it should consider changing the price cap.

The call for input also presents analysis of the changes in repeat and multiple borrowing in the HSTC market. The FCA's previous analysis highlighted that many consumers were frequent users of HSCTC; noting that on average, in 2012/2013, consumers took out six loans a year with 10 loans or more not uncommon. The FCA has analyzed data from 2014/2015 and is seeking advice on the results, noting that repeat borrowing has decreased noticeably. The rate of decline in the number of consumers who are repeat borrowing is greater than the decline in the overall lending volumes in the market. The FCA concludes that there is not a clear detriment from repeat and multiple borrowing. Furthermore, the FCA notes that there is no clear relationship of consumers who repeatedly borrow always ending up in arrears. Responses are due by February 15, 2017.

The Call for Input is available at: https://www.fca.org.uk/publication/call-for-input/call-input-high-cost-short-term-credit.pdf.

UK Prudential Regulator Consults on Raising the Deposit Protection Limit

On November 21, 2016, the PRA published a consultation paper on proposals to reset the deposit protection limit at £85,000. The purpose of the update 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 €100,000. The DGSD also requires that such countries, including the UK, must adjust their deposit protection limit to take into account currency fluctuations. Following the Brexit referendum on June 23, 2016, the PRA considers that a structural shift in the exchange rates has occurred and to comply with the DGSD, the PRA is proposing that the depositors' protection level be raised to £85,000 from January 30, 2017. This will require an increase of £10,000 pounds from the limit that was set in 2015. The PRA is also proposing a five-month transitional period until June 30, 2017 for firms to implement changes to their disclosure materials, advertising materials and Single Customer View (SCV) and Continuity of Access (CoA) systems to accurately reflect the new deposit protection limit. Prior to June 30, 2017, firms will be required to notify the PRA if they are ready to implement the rule changes and will become subject to the new rules from the next business day following notification. Separate notifications are available for: (i) SCV and CoA systems; and (ii) disclosure and advertising materials. The PRA notes that it will seek to maintain a stable deposit protection limit through uncertainty in foreign exchange markets resulting from the referendum, but will seek to avoid making further adjustments to the limit. Responses to the proposals are due by December 16, 2016.

The consultation paper is available at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/ 2016/cp 4116.pdf.

Corporate Governance

European Central Bank Publishes Draft Guidance on Fit and Proper Assessment

On November 14, 2016, the ECB published for consultation draft Guidance on the fit and proper assessment of members of management bodies of significant banks. The ECB is responsible for direct prudential supervision of certain significant banks based in the Eurozone as part of the Single Supervisory Mechanism. The purpose of the draft Guidance is to outline how the ECB will evaluate the qualifications, skills and proper standing of a candidate for becoming a member of a management body. The draft Guidance builds on the current draft guidance under the CRD and the revised Markets in Financial Instruments Directive published by ESMA and the EBA on October 28, 2016.

The assessment criteria for the fitness and proprietary of members of the management body are outlined in the draft Guidance. The criteria include experience, reputation, conflicts of interest and independence of mind, time commitment and collective suitability. The draft Guidance provides information on the purpose, scope and type of interviews conducted by the ECB of appointees. The draft Guidance highlights how a decision is taken by the ECB after every fit and proper assessment and the various types of decisions that may be taken. The draft Guidance also notes that under the SSM Regulation, the ECB has the power to remove, at any time, members from the management body of a significant supervised entity who do not fulfill the fit and proper requirements, which is provided for in the SSM Regulation. The ECB is seeking feedback on its draft Guidance by January 20, 2017.

The draft Guidance Text is available at: https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/fap/fap_guide.en.pdf?723db13839d47e0800b8c930a641893f.

Credit Ratings

European Securities and Markets Authority Publishes Final Report on Validation and Review of Credit Rating Agencies' Methodologies

On November 15, 2016, ESMA published its final Report on Guidelines on how Credit Rating Agencies should review and validate their methodologies. The CRA Regulation requires CRAs to review their methodologies, as well as quantitative and qualitative techniques used as part of the validation of the methodologies, to ensure that they are rigorous, systematic and continuous and subject to validation based on historical experience. The Guidelines clarify ESMA's expectation that a CRA must review its credit ratings and methodologies on an ongoing basis and at least annually. The Guidelines focus in particular on quantitative measures, and the purpose of the Guidelines is to increase the quality of such quantitative measures used by requiring CRAs to review their methodologies and to support the RTS on ratings methodologies. The Report follows a consultation published by ESMA on July 13, 2016. The Report provides a summary of the responses received and a qualitative assessment of the potential costs and benefits of the Guidelines. The Guidelines are to be translated into the official languages of the EU and will apply two months after the date of publication of those translations on ESMA's website.

ESMA's Final Report is available at: https://www.esma.europa.eu/sites/default/files/library/2016-1575_final_report_on_guidelines_on_the_validation_and_review_of_cras_methodologies_4.pdf.

Derivatives

US Commodity Futures Trading Commission Reproposes Position Limits Rule and Finalizes Aggregate Positions Rule

On December 5, 2016, the Commodity Futures Trading Commission voted unanimously to repropose regulations implementing limits on speculative futures and swaps positions as called for in the Dodd-Frank Act. In a separate vote, the CFTC approved final aggregation regulations, which are a key component of the CFTC's existing position limits regime. The reproposal will be open for public comment for 60 days after publication in the Federal Register.

In response to comments on a prior proposal published in December 2013, and on a supplemental proposal published in June 2016, the CFTC is reproposing limits on speculative positions in 25 core physical commodity futures contracts and their "economically equivalent" futures, options and swaps (referenced contracts), and is deferring action on three cash-settled commodities.

The CFTC is also reproposing the definition of bona fide hedging position, as well as exemptions for bona fide hedging positions in physical commodities. Exemptions are being reproposed for, among other things, positions that are established in good faith prior to the effective date of the initial limits that would be established by final regulations.

In addition, the reproposed regulations include requirements and acceptable practices for Designated Contract Markets (DCMs) and Swap Execution Facilities (SEFs) for setting position limits for the 25 referenced contracts, as well as acceptable practices for exchange position limits or accountability rules in all other listed contracts, including excluded commodities. The reproposed regulations also permit exchange recognition of non-enumerated bona fide hedging positions, certain enumerated anticipatory hedge positions and granting of spread exemptions. The reproposal includes updated reporting requirements under part 19 of the CFTC's regulations.

Finally, the reproposed regulations would delay any requirement for DCMs and SEFs that lack access to sufficient swap position information to establish position limits on swaps that are subject to a federal position limit.

The reproposal is available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister 120516.pdf; a fact sheet regarding the reproposal is available at: http://www.cftc.gov/idc/groups/public/@newsroom/ documents/file/plreproposal_factsheet120516.pdf; and the final aggregation regulations are available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister120516a.pdf.

US Commodity Futures Trading Commission Proposes Rule Establishing Minimum Capital Requirements for Swap Dealers

On December 2, 2016, the CFTC issued a proposed rule establishing minimum capital requirements for Swap Dealers and Major Swap Participants. As required by section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the rules mandate minimum levels of qualifying capital for certain Swap Dealers and Major Swap Participants that are not subject to the capital rules of a prudential regulator. Under the proposed rule, the calculation of capital may be performed using the alternative approaches method, which are based on existing US bank regulators' capital requirements or the CFTC's future commission merchant and the SEC's broker-dealer net liquid asset capital requirements. In addition, Swap Dealers that predominantly engage in non-financial activities and Major Swap Participants can elect minimum capital requirements based on the tangible net worth of the entities or can use internal models to compute their regulatory capital, subject to CFTC or National Futures Association approval. The proposal also requires some Swap Dealers and Major Swap Participants to satisfy certain liquidity requirements as well as reporting, record-keeping and notification requirements. In a statement issued concurrently with the proposal, CFTC Chairman Timothy Massad expressed support for the rule, stating that the revised rule recognizes the diversity of business models amongst swap dealers. Comments on the proposal are due 90 days following the publication of the proposed rule in the Federal Register.

The text of the proposed rule is available at: http://www.cftc.gov/idc/groups/public/@newsroom/ documents /file /federalregister120216.pdf; and the text of Chairman Massad's statement is available at: http://www.cftc.gov/Press Room/SpeechesTestimony/massadstatement120216.

US Commodity Futures Trading Commission Extends No-Action Relief

On November 28, 2016, the CFTC extended the relief granted under No-Action Letters 15-62 and 15-63 until December 31, 2017. The extended no-action relief in CFTC Letter No. 16-80 exempts inter-affiliate swaps from the trade execution requirement under section 2(h)(8) of the Commodity Exchange Act, subject to certain requirements. In addition, CFTC Letter No. 16-81 extends temporary relief from the trade execution requirement to certain affiliate counterparties.

The text of CFTC Letter No. 16-80 is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-80.pdf; and the text of CFTC Letter No. 16-81 is available at: http://www.cftc.gov/idc/groups/public /@lrlettergeneral/documents/letter/16-81.pdf.

US Commodity Futures Trading Commission Extends No-Action Relief from Swap Data Reporting Rules for Swap Dealers of Particular Jurisdictions

On November 21, 2016, the CFTC released a no-action letter extending further no-action relief from swap data reporting requirements for swap dealers and major swap participants established under the laws of Australia, Canada, the EU, Japan or Switzerland that are not part of an affiliated group in which the ultimate parent is a US swap dealer, major swap participant, bank, bank holding company or financial holding company for an additional year, from December 1, 2016 to December 21, 2017. In a December 20, 2013 no-action letter, the CFTC had exempted such registered swap dealers and major swap participants from these jurisdictions from the swap data reporting rules in Parts 45 and 46 of the CFTC's regulations, an exemption which it later extended in 2014 and 2015. As the CFTC had not yet made comparability determinations as to whether the regulatory requirements of the foreign jurisdictions are comparable to and as comprehensive as its own, it believed that the extension of no-action relief is appropriate. The no-action relief will expire at the earlier of: (1) 30 days following the issuance of a comparability determination with respect to the reporting rules of the non-US swap dealer or non-US major swap participant's jurisdiction; or (2) December 1, 2017.

The no-action letter is available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-79.pdf.

US Commodity Futures Trading Commission Releases Stress Tests Results for Five Major Clearinghouses

On November 16, 2016, the CFTC released the results of supervisory stress tests of five major clearinghouses in the US and UK. The tests included eleven scenarios focusing on the most highly traded products at each clearinghouse. The tests focused on the largest clearing members at each clearinghouse, analyzing both their house and customer accounts. The CFTC noted three key findings: (1) clearinghouses have the pre-funded resources to remain resilient through a variety of extreme market price changes; (2) risk was diversified across the clearinghouses tested; and (3) clearing member risk was also diversified — no single scenario of the eleven accounted more than 19% of the worst outcomes.

The CFTC press release is available at: http://www.cftc.gov/PressRoom/PressReleases/pr7483-16.

US Commodity Futures Trading Commission Chair Timothy Massad Discusses Derivatives Regulation

On November 14, 2016, Timothy Massad, Chairman of the CFTC, spoke to the CME Global Financial Leadership Conference regarding derivatives regulation. In light of the election result, he highlighted three areas that his term as Chairman has focused on that he believes will continue to be important: technological changes in markets, the effects of the Dodd-Frank reforms and international concerns.

With respect to technological changes, Chairman Massad highlighted heightened cyber risk and the CFTC's continued focus in the area, as well as the growth of electronic and automatic trading. He also mentioned the CFTC's cooperation with other government agencies and increased enforcement efforts in the technological space.

Chairman Massad also discussed the CFTC's efforts to both implement and ease Dodd-Frank reforms. He focused specifically on mandated central clearing and on stress tests CFTC staff recently conducted on US and foreign clearinghouses with positive results. Beyond clearinghouse resiliency, Chairman Massad focused on liquidity risk, noting how market changes, including regulatory changes, affect the availability of liquidity for market participants in different sectors.

Finally, Chairman Massad noted the CFTC's increased focus on working closely with international regulators to harmonize rules and improve working relationships. He cited a number of specific projects where the CFTC is working with its foreign counterparts. He concluded his speech by noting that he hopes derivatives regulation remains consistent, despite political changes.

Chairman Massad's remarks are available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-51.

European Commission to Further Assess Issues on Implementation of the European Market Infrastructure Regulation

On November 23, 2016, the European Commission published a Report assessing the issues arising from the implementation of the requirements of EMIR. EMIR imposes reporting and clearing obligations, risk mitigation techniques for derivatives that are not cleared and requirements on CCPs and trade repositories. The Report summarizes the issues that stakeholders and market participants have raised in response to the Commission's public consultation on EMIR, as well as input from EU authorities such as ESMA. The Report does not propose any legislative changes but sets out particular areas where future legislative amendments might be needed or which are to be studied further. The Commission is proposing a legislative review of EMIR in 2017.

Issues that will be further considered by the Commission include more transparency from CCPs on margin requirements, the possibility of national regulators endorsing initial margin models, streamlining reporting requirements and improving the functioning of trade repositories and alternative methods for accessing of data held by trade repositories outside of the EU. The scope of EMIR will also be considered, including assessing whether:

- transactions entered into before the clearing obligation takes effect should be within scope;
- intragroup transactions should be subject to the risk mitigation requirements;
- the exemption for pension schemes should be prolonged or made permanent; and
- all non-financial counterparties should be subject to the clearing and margin requirements given the significant challenges NFC are facing in trying to comply.

The Commission is proposing to amend EMIR so that a clearing obligation can be suspended by it on request from a national regulator. The proposal is included in the proposed CCP Recovery and Resolution Regulation, published on November 28, 2016, and is only in the context of the resolution of a CCP. The possibility of extending the scope of the suspension of a clearing obligation for other appropriate purposes remains under consideration.

The EMIR Report is available at: http://ec.europa.eu/finance/financial-markets/docs/derivatives/161123-report_en.pdf.

Enforcement

US Securities and Exchange Commission Chair Mary Jo White Discusses SEC Enforcement

On November 18, 2016, Chair of the Securities and Exchange Commission Mary Jo White discussed the SEC's enforcement program, focusing on white collar crime in particular. She detailed the SEC's "Investigate to Litigate" philosophy, where SEC staff are instructed to conduct all investigations with litigation in mind. She also discussed a number of measures the SEC has to detect misconduct, from advanced data analysis to whistleblowers. In particular, she highlighted the SEC's focus on individual wrongdoers and its policy of requiring admissions as a condition for certain settlements.

Chair White then discussed the need to target more senior executives, praising the UK's recently implemented Senior Manager Regime, designed to incentivize executives and other senior managers to take greater responsibility for their actions. She also talked about the possibility of giving the SEC the authority to seek greater civil penalties and the dangers of proposed reforms that would require a criminal warrant, which the SEC cannot obtain, to seek certain electronic evidence as a part of investigations.

Chair White's remarks are available at: https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html.

Financial Crime

European Supervisory Authorities Publish Joint Guidelines on a Risk-Based Approach to Anti-Money Laundering and Terrorist Financing Supervision

On November 16, 2016, the Joint Committee of the European Supervisory Authorities published joint Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision. The ESAs consist of the EBA, ESMA and the European Insurance and Occupational Pensions Authority. The Guidelines build on the ESA's previous "Preliminary report on AML and counter financing of terrorism Risk Based Supervision" that was published in October 2013. The Guidelines outline steps to be taken by regulators when conducting AML/CTF supervision on a risk-sensitive basis. The Fourth Anti-Money Laundering Directive, amongst other things, aims to bring European legislation in line with the Financial Action Task Force's International Standards on Combating Money Laundering and the Financing of Terrorism. The ESAs emphasize that AML-and CFT-related risk-based supervision is ongoing and cyclical and the Guidelines outline four requisite steps that national regulators should apply. Step 1 involves the regulator identifying the money laundering or terrorist financing risk factors by obtaining information of both domestic, foreign and sector-wide threats. Step 2 requires the information to be used by the regulator to conduct a risk assessment and obtain a holistic view of the risks associated with each firm. Step 3 requires the allocation of supervisory resources factoring in issues such as the required focus, depth, duration and frequency of the on-site and off-site activities and supervisory staffing needs. Step 4 requires regulators to ensure that the risk assessment and level of allocated supervisory resources remains commensurate to AML/CFT risks through ongoing monitoring and reviewing processes. The Guidelines will apply one year after the Guidelines have been issued.

The joint Guidelines are available at: https://esas-joint-committee.europa.eu/Publications/Guidelines/Final_RBSGL_for_ publication_20161115.pdf.

Basel Committee on Banking Supervision Consults on Revisions to Correspondent Banking Guidance for Money Laundering and Financing of Terrorism Risks

On November 23, 2016, the Basel Committee launched a 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. The Guidelines describe how banks should include money laundering and financing of terrorism risks within their overall risk management. The Basel Committee is seeking to confirm regulatory expectations on the assessment of money laundering and financing of terrorism risks in correspondent banking and its proposals follow the publication by the Financial Action Task Force of its Guidance on correspondent banking on October 21, 2016. The proposed revisions to the Guidelines develop the application of the risk-based approach for correspondent banking relationships, including recognizing that not all correspondent banking relationships carry the same level of risk. The proposed revisions also clarify expectations regarding the quality of payment messages and the conditions for using "know your customer" (KYC) services. Responses to the consultation are requested by February 22, 2017.

The consultation paper is available at: http://www.bis.org/bcbs/publ/d389.pdf; the Guidelines on Sound Management of Risks Related to Money Laundering and Financing of Terrorism is available at: http://www.bis.org/bcbs/publ/d353.pdf; and the FATF's Guidance is available at: http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-Correspondent-Banking-Services.pdf.

Financial Market Infrastructure

UK Payment Systems Regulator Consults Further Remedies for Competition Issues Relating to Bank Ownership of Payment Infrastructure

On December 7, 2016, the Payment Systems Regulator published proposals for remedying the lack of competition in the provision of UK payments central infrastructure for Bacs, FPS and LINK which means that the incumbent provider, VocaLink, faces limited competitive pressure and minimal incentives to provide more efficient and innovative services.

The PSR published its final report on its market review into the ownership and payment infrastructure competitiveness in the UK on July 28, 2016. The final report identified the competition issues and outlined potential remedies, including undertaking competitive procurement exercises, such as issuing guidance and requiring operators of payment service providers to follow a prescribed set of processes and implementing enhanced interoperability, including a common international messaging standard, for Bacs and FPS, and divestment by the four largest shareholders in VocaLink. Following feedback to those initial proposals, the PSR is now consulting on mandating competitive procurement exercises for Bacs, FPS and LINK when the operators of these systems purchase central infrastructure services and introducing the ISO 20022 messaging standard in future procurements for Bacs and FPS.

The PSR is no longer considering the divestment remedy for VocaLink because of the proposed acquisition by MasterCard of VocaLink which would, in the PSR's view, remedy the issue. If the proposed acquisition does not go ahead, the PSR will consult separately on the divestment remedy.

The consultation closes on February 1, 2017. The PSR is intending to publish its final decision on the remedies in Q2 2017.

The consultation paper is available at: https://www.psr.org.uk/sites/default/files/media/PDF/MR15-2-4-IMR-Remedies-consultation.pdf.

European Securities and Markets Authority Opines on Supervisory Approach for CCPs' Service Extension

On November 15, 2016, ESMA published an Opinion outlining a common supervisory approach for regulators dealing with CCPs that seek to extend or change their existing authorization under EMIR or to adopt a significant change to their risk model and parameters. The purpose of the Opinion is to build a common supervisory culture by creating uniform procedures and consistent approaches throughout the EU. EMIR requires a CCP wishing to extend its business to additional products and services not covered by its initial authorization to apply to its regulator for an extension, and to obtain validation before adopting any significant changes to its risk model and parameters. EMIR does not define or specify what "additional services and activities" are, nor the notion of "significant change." The Opinion provides indicators to assist regulators to identify when a change is significant and to seek the college's opinion, as required by EMIR, on the extension of services and activities. The college is made up of EU regulators and ESMA. For example, ESMA considers that any service or activity (including services linked to clearing) that exposes a CCP to new or increased risk as well as any such services in respect of a class of financial instruments with a different risk profile or with material differences from the products currently cleared by a CCP shall be considered additional. The Guidelines provide a non-exhaustive list of indicators regulators should consider when determining whether changes to a CCP's models or parameters are significant. For example, if the introduction of one or more new products or services that do not materially differ from the ones that the CCP in question is already authorized to clear or provide, are based on a new set of risk factors and/or involve the development or implementation of new fault or stress scenarios, this would indicate the existence of significant change. The regulator must consider the opinion of the college in accordance with the procedures outlined in EMIR.

ESMA's Opinion is available at: https://www.esma.europa.eu/sites/default/files/library/2016-1574_-_opinion_on_significant_changes_for_ccps.pdf.

Financial Services

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

On December 8, 2016, the Council of the European Union announced the conclusion of a provisional agreement with representatives of the European Parliament on new rules on prospectuses for the issuing and offering of securities. 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 reducing 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.

The Council's press release is available at: http://www.consilium.europa.eu/press-releases-pdf/2016/ 12/472 44651895 _en.pdf; a note on the European Commission's proposal for a Prospectus Regulation is 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 Commission Reports on Feedback to the Call for Evidence on the EU Regulatory Framework for Financial Services

On November 23, 2016, the European Commission published a Communication to the European Parliament, the Council of the European Union on the follow-up to its Call for Evidence on the EU regulatory framework for financial services. The European Commission launched its Call for Evidence on the EU regulatory framework in September 2015 alongside its Action Plan for a Capital Markets Union. The Call for Evidence sought feedback on unnecessary regulatory burdens, inconsistencies, gaps and unintended consequences of EU financial services legislation. Following an analysis of the feedback received, the Commission has concluded that targeted action is required to address some of the shortcomings that have been highlighted. Where possible, the Commission has integrated the feedback into existing initiatives such as the review of the Capital Requirements Regulation and EMIR or the future development of the CMU but there are some instances where new policy action will be needed. The Communication includes an action plan indicating how the issues are intended to be addressed.

The Communication is available at: http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-855-F1-EN-MAIN.PDF.

FICC Markets Standards Board Final Guidelines on Surveillance and Training in Wholesale Markets

On December 8, 2016, the Fixed Income, Currency and Commodities Markets Standard Board published Guidelines on surveillance and training in wholesale markets. The guidance is outlined in the FMSB's Statement of Good Practice for Surveillance in Foreign Exchange Markets and Statement of Good Practice for Conduct Training. The Statement of Good Practice for Surveillance highlights the FMSB's Core Principles that firms should consider in advance of designing and implementing their surveillance measures in the foreign exchange markets, such as ensuring that: (i) the surveillance function is independent of front office; (ii) there are effective governance controls; and (iii) there is a regular review of surveillance systems to ensure that they are fit for purpose given the element of constant change in risk. It also identifies emerging practices to combat the risk of insider dealing and market manipulation, including the use of automated voice surveillance systems using techniques such as Natural Language Processing.

The FMSB's Statement of Good Practice for Conducting Training sets out Core Principles for member firms to conduct training and the good practices that should be followed to achieve the desired outcomes. Member firms should have a clear organizational structure for delivering a risk-based program of conduct training that is appropriate to their firm. The FMSB highlights that, amongst other things, whilst there is no clear consensus on which function within a firm should be responsible for determining the conduct training needs, it has specified some elements for a training framework, including clear roles and responsibilities for administering the framework and strong first line accountability for decision-making. The FMSB has also recommended that senior front office management should play a bigger role in conduct training to enable face-to-face discussion with staff on conduct issues.

The FMSB was established in 2015 and has developed standards to improve conduct in the FICC markets. The Statements of Good Practice are not part of the FMSB Standards and are not binding on FMSB members, but reflect the FMSB's view of what constitutes good or best practice in the areas covered.

The Statement of Good Practice for Surveillance in Foreign Exchange Markets is available at: http://www.femr-mpp.co.uk/wp-content/uploads/2016/12/16-12-08-SoGP_Surveillance-in-FX-Markets_FINAL.pdf; the Statement of Good Practice for Conducting Training is available at: http://www.femr-mpp.co.uk/wp-content/uploads/2016/12/16-12-08-SoGP-Conduct-Training_FINAL.pdf.

FinTech

US Office of the Comptroller of the Currency to Grant Charters to Fintech Firms

On December 2, 2016, the Comptroller of the Currency, Thomas Curry, announced that the OCC would commence considering applications from financial technology companies that offer bank products and services for a grant of a special purpose bank charter. The ability to obtain a bank charter would eliminate the need for Fintech companies to register in multiple states, each with different laws and restrictions. Although the details of the charter are not final, the OCC released a paper discussing the issues and conditions that will be considered in granting special purpose bank charters. That paper indicates that such institutions would not be required to take FDIC-insured deposits. In a related Fintech development, Federal Reserve Board Governor Brainard gave a speech at a Federal Reserve Board conference on emerging financial technologies. She addressed various developments and the need to address related risks, and she noted the Federal Reserve Board's earlier establishment of a working group on fintech innovation.

The OCC press release is available at: https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html; the OCC paper is available at: https://occ.gov/topics/bank-operations/innovation/special-purpose-national-bank-charters-for-fintech.pdf; and Governor Brainard's speech is available at: https://www.federalreserve.gov/newsevents/speech/brainard20161202a.pdf.

US Federal Reserve Board Releases Discussion Paper on Distributed Ledger Technology

In early December 2016, the US Federal Reserve Board's Divisions of Research & Statistics and Monetary Affairs released a discussion paper entitled "Distributed Ledger Technology in Payments, Clearing, and Settlement."

The paper notes how digital innovations in finance, loosely known as Fintech, have garnered a great deal of attention across the financial industry. Distributed ledger technology (DLT) is one such innovation that has been cited as a means of transforming payment, clearing and settlement processes, including how funds are transferred and how securities, commodities and derivatives are cleared and settled. The paper examines how this technology might be used in the area of payments, clearing and settlement and to identify both the opportunities and challenges facing its practical implementation and possible long-term adoption. The authors state that DLT has the potential to provide new ways to transfer and record the ownership of digital assets; securely store information; provide for identity management; and other evolving operations through peer-to-peer networking, access to a distributed but common ledger among participants and cryptography. Potential use cases in payments, clearing and settlement include cross-border payments and the post-trade clearing and settlement of securities transactions. These use cases could address operational and financial frictions around existing services.

Nonetheless, the paper notes that the industry's understanding and application of this technology is still in its infancy, and stakeholders are taking a variety of approaches toward its development. Given the technology's early stage, a number of challenges to development and adoption remain, including in how issues around business cases, technological hurdles, legal considerations and risk management considerations are addressed.

The discussion paper is available at: https://www.federalreserve.gov/econresdata/feds/2016/files/2016095pap.pdf.

US Securities and Exchange Commission Commissioner Piwowar Calls for SEC to Take the Lead on FinTech

On November 14, 2016, SEC Commissioner Michael S. Piwowar spoke at the SEC's Financial Technology Forum, calling for the SEC to take "the lead regulatory role" in the FinTech space, noting that the SEC is "uniquely situated" to do so. Piwowar claimed the current regulatory struggle for financial technology firms is not dealing with any specific regulation, but dealing with navigating multiple regulators and possibly contradictory regulation. He stated that the SEC is the ideal regulator for FinTech companies because many financial technology firms are already SEC registrants and the SEC has a unique mandate and capacity to regulate the emerging industry.

Commissioner Piwowar's remarks are available at: https://www.sec.gov/news/statement/piwowar-statement-financial-technology-forum-111416.html.

Funds

UK Regulator Publishes Interim Report on Asset Management Market Study

On November 18, 2016, the FCA published an interim report following its Asset Management Market Study. As per The Terms of Reference, the FCA investigated three core areas: (i) how asset managers compete to deliver value; (ii) whether asset managers are willing and able to control costs and quality along the value chain; and (iii) how investment consultants affect competition for institutional asset management. The FCA also looked at whether there are any barriers to innovation that prevent investors from obtaining better results.

The FCA found that, based on the evidence produced, a weak price competition exists in a number of areas of the asset management industry. The lack of competition has a material impact on the investment returns of investments as a consequence of their payments for asset management services. The FCA reviewed product development and innovation in the asset management market and concluded that there is some evidence of innovation and limited evidence of any significant structural or regulatory barriers to entry. The FCA is of the view that despite the interim finding raising concerns about how effectively competition drives value for investors in the asset management sector, there are also some competitive pressures building in parts of the market and this is likely to continue.

The FCA has identified several ways that asset management products and services could work better for retail and institutional investors. The FCA is proposing, for example, a strengthened duty on asset managers to act in the best interest of investors as well as an "all-in fee" for quoting charges to increase transparency. The FCA is also proposing measures that could help retail investors identify the best fund for them by requiring asset managers to be clear about the objectives of the fund and also clarifying and strengthening the appropriate use of benchmarks. The FCA is seeking views on the findings and potential remedies outlined in the interim Report, with responses due by February 20, 2017.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/1659311/Consultation+Paper+on+Guidelines+on+PD+LGD+estimation+and+treatment+of+defaulted+assets+%28EBA-CP-2016-21%29.pdf; and the EBA's Opinion and Report on the implementation of the IRB approach is available at: http://www.eba.europa.eu/-/eba-sets-out-roadmap-for-the-implementation-of-the-regulatory-review-of-internal-models.

MiFID II

European Commission Adopts Technical Standards on Criteria for the Ancillary Activity Exemption

On December 1, 2016, the Commission adopted RTS supplementing the revised MiFID, setting out when an activity is "ancillary" to a firm's main business. MiFID II provides an exemption from the requirement for authorization as an investment firm when dealing on own account, or providing investment services to clients in commodity derivatives, emission allowances or derivatives thereof, provided that the activity is an ancillary activity to their main business on a group basis and the main business is not the provision of investment services within the meaning of MiFID II or banking activities under the CRD. Adoption of the RTS follows the consultation by ESMA on the draft RTS. The Commission proposed changes to ESMA's final draft RTS, which was submitted on September 28, 2015, including a capital test to distinguish a group's main activates from its ancillary activities. The Commission requested a methodology to specify the allocation of capital between the main business activity and the ancillary activity to enable groups to demonstrate, based on the capital employed, where the group's main business activity resides. On May 30, 2016, ESMA responded by way of formal opinion and revised draft RTS. Rather than a single capital based methodology, ESMA proposed five options for speculative trading and three for a group's main activity. ESMA did not stipulate which of the options was to be preferred and did not specify a threshold for determining the percentage of speculative trading by a group's main activity that would trigger the requirement for authorization under MiFID II.

The adopted RTS provides a "market share test" on correspondent trading activity thresholds. This compares the level of an entity's trading activity with that of the overall activity in the EU based on a particular asset class. This test determines whether the activities conducted, such as dealing on own account, should be considered ancillary to the main business of the group. The adopted RTS outlines a "main business test," with corresponding thresholds, to determine whether the non-hedging trading in commodity derivatives would constitute a minority of activities at a group level and specifies the details to be used when calculating the size of a group's trading activities. The adopted RTS also contains criteria to determine the difference between non-hedging transactions in derivatives and those that can objectively be considered as reducing the risk directly relating to commercial activity or hedging and which would not count towards the trading activity as measured in the numerator in both tests. The adopted RTS will enter into force after they are published in the Official Journal of the European Union, and will apply from January 3, 2018.

The RTS on the criteria for the Ancillary Activity Exemption is available at: http://ec.europa.eu/transparency/ regdoc /rep/3/2016/EN/C-2016-7643-F1-EN-MAIN.PDF?_sm_au_=iVVvStMFPr71kS26.

Final EU Secondary Legislation on Access to Benchmarks Published

On November 19, 2016, RTS on access in respect of benchmarks was published in the Official Journal of the European Union. The RTS supplement MiFIR. MiFIR provides for non-discriminatory access to benchmarks for the purposes of clearing and trading for CCPs and trading venues. This includes access to the licenses of, and information relating to, benchmarks which are used to determine the value of some financial instruments for trading and clearing purposes. The RTS specifies that a person with proprietary rights to a benchmark must, upon request, make available to CCPs and trading venues the information necessary to perform their clearing or trading functions. For CCPs, the functions include the appropriate risk management of relevant open positions in exchange-traded derivatives, including netting, and compliance by the CCP with its obligations under EMIR. For trading venues, such functions include the initial assessment of the characteristics of the benchmark, the marketing of the relevant product and the support of the price formation process for the contracts admitted or being admitted to trading. The RTS state that the provision of price and data feeds must include the feed of the benchmark's values and the prompt notification of any inaccuracy in the calculation of the benchmark values and of the updated or corrected benchmark values. The RTS also sets out general conditions on the provision of information through licensing and the minimum conditions that a benchmark owner must set for licensing agreements.

MiFIR further provides that when a new benchmark is developed after January 3, 2018 (when MiFIR will start to apply), the owner of the benchmark must show that the benchmark is a new benchmark and not merely a copy or adaptation of an existing benchmark. The RTS set out the standards guiding how a benchmark may be proven to be new.

The RTS entered into force on December 9, 2016, and will apply from January 3, 2018.

The RTS on access to benchmarks is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:32016R2021&from=EN.

Final EU Secondary Legislation on Third-Country Firms' Applications for the Provision of Investment Services Published

On November 19, 2016, RTS on the required information for registration of third country firms and the format of information provided to clients was published in the Official Journal of the European Union. The RTS supplement MiFIR on the provision of services and performance of activities by third-country firms following an equivalence decision with or without a branch. The RTS specifies the information necessary for registration with ESMA. The RTS requires firms to update ESMA, within 30 days, of any changes to the information provided in its application. MiFIR requires third-country firms, before providing investment services for clients in the EU, to inform such clients that they are not permitted to perform services for clients other than eligible counterparties and professional clients within the

definition of the revised MiFID and, furthermore, that they are not subject to supervision in the EU. The RTS provides that the notice must be provided in a "durable medium" (which includes electronic media); such that, amongst other things, it is in English or the in the official language, or one of the official languages, of the Member State where the services are to be provided.

The RTS on application by third-country firms for permission to provide investment services is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2022&from=EN.

UK Prudential Regulation Authority Issues Second Consultation Paper on Implementing MiFID II

On November 25, 2016, the PRA launched its second consultation on implementing certain aspects of the Markets in Financial Instruments legislative package, which comprises MiFID and the Markets in Financial Instruments Regulation, collectively known as MiFID II. The consultation relates to requirements for a firm's management body and organizational requirements as well as to the new regulated activity of operating an Organised Trading Facility and the new financial instrument of "emission allowances" and structured products. The PRA consulted on its approach to passporting and algorithmic trading earlier in 2016 and has published its final rules for those areas. The PRA will consult on other aspects related to MiFID II in due course.

The governance and organizational requirements of MiFID II are detailed in a Commission Delegated Regulation on organizational requirements and operating conditions for investment firms which the European Commission adopted on April 25, 2016. As a Regulation, it will apply directly to firms subject to MiFID II across the EU once it comes into force. The PRA is proposing that its rules in this regard will be removed from its Rulebook. The PRA is proposing that the requirements in the Delegated Regulation be extended to the non-MiFID business of those firms that are in-scope of MiFID II and is proposing to implement that approach through changes to its Rulebook.

MiFID II introduces a new regulated activity of operating an OTF (a new type of trading facility), designates emission allowances as a new class of financial instrument and imposes new marketing requirements in relation to structured products, among others. The UK Government is intending to amend the Regulated Activities Order to transpose these requirements into UK law and to grant the UK regulators powers to process applications for variation of permission in advance of January 3, 2018 (the date from which MiFID II will apply). Subject to that legislation being finalized, the PRA is proposing that the transitional measure in the draft UK legislation be available so that a firm which is already undertaking certain regulated activities in relation to structured products would only need to notify the PRA of its wish to carry out those regulated activities in relation to structured products. The PRA proposes to direct firms that wish to use the transitional measure to notify the PRA using the variation of permission form available on its website.

MiFID II will apply from January 3, 2018. Member states are required to transpose the requirements into national laws by July 3, 2017. The PRA's proposed rules are expected to apply from January 3, 2018. Responses to the PRA's consultation are requested by February 27, 2017.

The PRA's consultation paper – Part 2, is available at: http://www.bankofengland.co.uk/pra/Documents /publications/cp/2016/cp4316.pdf; and the PRA's final rules and Policy Statement on passporting and algorithmic trading is available at: http://www.bankofengland.co.uk/pra/Pages/publications /cp/2016/cp4316.aspx?utm_source= Bank+ of+England+updates&utm_campaign=23c1253d15-EMAIL_CAMPAIGN_2016_11_25&utm _medium =email& utm_term=0_556dbefcdc-23c1253d15-113384529.

Payment Services

EU Draft Guidelines on Major Incident Reporting Published for Consultation

On December 7, 2016, the EBA launched a consultation on draft Guidelines on major incidents reporting under the Payment Services Directive 2. PSD2 requires payment service providers to notify their national regulator without delay of any major operational or security incident. The national regulator must assess the relevance of the incident to other authorities in its Member State and notify them accordingly. In addition, the national regulator must pass on the details of the incident to the EBA and the ECB and, with them, assess the relevance of the incident to other EU bodies and Member States and notify them accordingly.

The EBA is responsible for preparing Guidelines addresses to PSPs on the classification of major incidents and on the content, the format, including standard notification templates and the procedures for notifying an incident to their regulator. In addition, the EBA must prepare Guidelines for national regulators on the criteria for assessing the relevance of an incident and the details of the incident report to be shared with other authorities. Both Guidelines must be developed in close cooperation with the ECB. The EBA's consultation paper sets out the proposed Guidelines as developed by the EBA with the ECB. Responses to the consultation are requested by March 7, 2017.

The consultation paper is available at: http://www.eba.europa.eu/documents/10180/1688810/Consultation+Paper +on+the+ Guidelines+on+Major+Incidents+Reporting+under+PSD2+%28EBA-CP-2016-23%29.pdf.

UK Payment Systems Regulator Publishes Consultation Paper on Proposed Financial Penalty Scheme

On November 17, 2016, the PSR published a consultation paper and proposed guidance on the Financial Penalty Scheme that is applicable to penalty payment amounts retained by the PSR. The PSR's enforcement powers under the Financial Services (Banking Reform) Act 2013 allow the PSR to impose penalties for compliance failures on firms subject to regulation. The PSR pays penalties it receives to HM Treasury whilst retaining an amount to cover enforcement costs. The PSR proposes to use the amount retained to reduce regulatory fees levied in a particular year from payment service providers. As a result, some of the PSR's enforcement costs would be funded through penalties imposed, rather than through fees. The consultation paper outlines a number of situations that might arise and how the scheme could apply. For example, where payment service providers have become liable to pay penalties in the previous year and are also fee payers, the PSR would ensure that such parties do not receive any returned retained amounts under the Financial Penalty Scheme. Responses to the consultation are due by January 13, 2017.

The consultation paper is available at: https://www.psr.org.uk/sites/default/files/media/PDF/PSR-CP165-consultation-paper.pdf and the proposed Guidance on the Financial Penalty Scheme is available at: https://www.psr.org.uk /sites/ default/files/media/PDF/Draft-Financial-Penalty-Scheme.pdf.

People

President-Elect Trump Announces Nominations for Treasury Secretary and Commerce Secretary

Over the past month, President-elect Donald Trump has made several selections for key administration posts. Notably, President-elect Trump said he would nominate Steven Mnuchin to serve as Treasury Secretary. Mnuchin was the Trump campaign's national finance chair. He is also a former Goldman Sachs Partner and led the investor group that acquired the failed IndyMac Bank from the FDIC and operated it as OneWest Bank. While serving as campaign finance chair, Mnuchin outlined some of the economic priorities of the Trump administration: in August he said that a Trump administration would be "focused on lowering business taxes, making sure that US corporations are competitive around the world, bringing back cash from all around the world that's sitting offshore." President-elect Trump has also chosen Wilbur Ross as Commerce Secretary, a businessman who has not held any previous public office.

Enforcement Director Ceresney to Leave US Securities and Exchange Commission

On December 8, 2016, the US Securities and Exchange Commission announced that Enforcement Director Andrew J. Ceresney will leave the agency by the end of the year. Upon Mr. Ceresney's departure, Stephanie Avakian, Deputy Director of the SEC's Enforcement Division, will become the Acting Director.

The SEC press release is available at: http://www.sec.gov/news/pressrelease/2016-259.html.

Division of Corporation Finance Director Higgins to Leave US Securities and Exchange Commission

On December 6, 2016, the SEC announced that Keith F. Higgins, Director of the SEC's Division of Corporation Finance, plans to leave the SEC in early January. Upon Mr. Higgins's departure, Shelley Parratt, Deputy Director for the Division of Corporation Finance, will become the acting Director. Ms. Parratt has served previously as acting Director.

The SEC's press release is available at: http://www.sec.gov/news/pressrelease/2016-258.html.

US Securities Exchange Commission Chief Litigation Counsel, Matthew C. Solomon to Leave

On November 21, 2016, the SEC announced that Matthew C. Solomon, the Chief Litigation Counsel for the SEC's Enforcement Division, will leave the SEC early December 2016.

The SEC press release is available at: https://www.sec.gov/news/pressrelease/2016-244.html.

US Securities Exchange Commission Director of the Division of Trading and Markets to Leave

On November 21, 2016, the SEC announced that Stephen Luparello, Director of the Division of Trading and Markets, will leave the SEC by the beginning of 2017.

The SEC press release is available at: https://www.sec.gov/news/pressrelease/2016-245.html.

Upcoming Events

January 5, 2017: EBA and ESMA public hearing on their proposed Guidelines on Internal Governance and Joint Guidelines on the assessment of the suitability of members of the Management Body and Key Function Holders (registration closed on December 13, 2016)

January 13, 2017: ECB public hearing on fit and proper assessment

January 19, 2016: EBA public hearing on draft Guidelines on the application of the IRB approach (PD estimation, LGD estimation and treatment of defaulted assets) (registration closes December 29, 2016)

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

Upcoming Consultation Deadlines

December 22, 2016: EBA consultation on proposed draft technical standards supplementing the PAD

December 31, 2016: BoE consultation on reforms to Sterling Overnight Index Average Interest Rate Benchmark (SONIA)

January 2, 2017: EBA consultation on draft amending ITS on additional monitoring metrics for liquidity reporting

January 3, 2017: ESMA consultation on draft RTS on package orders under MiFIR

January 4, 2017: FCA third consultation on implementation of MiFID II

January 5, 2017: HM Treasury consultation on New Rules for Financial Market Infrastructure Special Administration Regime

January 5, 2017: ESMA consultation on proposed Guidelines on management of exchanges and Data Reporting Service Providers under MiFID II

January 5, 2017: ESMA consultation on proposed Guidelines on the product governance requirements under MiFID II

January 5, 2017: ECB consultation on proposals to harmonize the exercise of options and discretions applicable to less significant firms under CRD and CRR

January 6, 2017: FCA consultation on changes to rules on delaying disclosure of information

January 6, 2017: Comments to US federal regulatory agencies' proposed rule on loans in areas having special flood hazards — private flood insurance

January 6, 2017: EBA consultation on assessment of Information and Communication Technology risk under the Supervisory Review and Evaluation Process

January 7, 2017: EBA consultation on proposed revised ITS on supervisory reporting relating to sovereign exposures and operational risk

January 9, 2017: Comments to SEC proposed rule on proxy voting

January 9, 2017: PRA and FCA consultation on amendments to the Senior Manager & Certification Regimes

January 17, 2017: Comments to ANPR on enhanced cybersecurity risk-management and resilience standards

January 20, 2017: ECB consultation on fit and proper assessment of member of management bodies of significant banks

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

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

March 7, 2017: EBA consultation on draft Guidelines on major incidents reporting under PSD2

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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