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STRUCTURED THOUGHTS

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FINAL CANADIAN BAIL-IN RULES: IMPACT ON STRUCTURED NOTES OFFERED IN THE UNITED STATES

In March 2018, the Canadian government released its final regulations relating to "bail-in instruments" issued by Canadian domestically systemically important banks ("D-SIBs"). The regulations are a key part of Canada's new bank recapitalization plan. Under the plan, certain bank instruments, including many debt securities, may convert into the issuer's equity securities if an issuer becomes non-viable.

The final rules do not differ significantly from the rules as they were proposed in June 2017, which we discussed in our July 12, 2017 issue of this publication, which may be accessed here: https://media2.mofo.com/documents/170712-structured-thoughts.pdf.

We note that Canada's Office of the Superintendent of Financial Institutions ("OSFI") has not yet published the final rules relating to its draft Total Loss Absorbing Capacity ("TLAC") guideline. OSFI had issued proposed rules in 2017.

The bail-in regulations will become effective on September 23, 2018 (the "effective date"). They are expected to have a significant impact on how

Canadian banks issue debt securities around the world. We discuss in this article the principal impact of the final regulations on Canadian banks that issue structured notes into the U.S. market.[1]

TIMING OF EFFECTIVENESS AND NEW ISSUANCES

Under the final regulations, D-SIBs will have until the effective date to prepare for their initial issuances of bail-in-able instruments. Notes and other instruments that are issued before the effective date will not be subject to the bail-in rules except in limited circumstances, such as if they are amended or extended in a certain manner.

INSTRUMENTS THAT ARE SUBJECT TO THE RULES

Securities and other instruments would be subject to the bail-in provisions if they satisfy all of the following criteria:

- they have an initial term to maturity greater than 400 days;
- they are unsecured and unsubordinated; and
- they are assigned a CUSIP or ISIN (or similar security identification) number in order to facilitate their trading.

If a conversion of the bail-in debt occurs, the holders of the bail-in debt must receive more common shares per dollar of claim than the holders of the issuer's subordinated debt and preferred shares.[2]

STRUCTURED NOTES AND OTHER EXCLUSIONS FROM THE BAIL-IN REGIME

Covered bonds, other secured debt, derivatives, structured notes and certain other liabilities are explicitly excluded from the bail-in regime. Deposits (other than deposit notes[3]) with a D-SIB will also be outside the scope of the bail-in regime.

As is the case in connection with the U.S. TLAC regulations, the definition of "structured note" is significant. The regulations would define "structured note" as:

> "...a debt obligation that (a) specifies that the obligation's stated term to maturity, or a payment to be made by its issuer, is determined in whole or in part by reference to an index or reference points, including (i) the performance or value of an entity or asset, (ii) the market price of a security, commodity, investment fund or financial instrument, (iii) an interest rate, and (iv) the exchange rate between two currencies; or (b) contains any other type of embedded derivative or similar feature.
>
> However, the following debt obligations are *not* structured notes [emphasis added]: (a) a debt obligation in respect of which the stated term to maturity, or a payment to be made by its issuer, is determined in whole or principally by reference to the performance of a security of that issuer; and (b) a debt obligation that (i) specifies that the return on the debt obligation is determined by a fixed or floating interest rate or a fixed spread above or below a fixed or floating interest rate, regardless of whether the return is subject to a minimum interest rate or whether the interest rate changes between fixed and floating, (ii) has no other terms affecting the stated term to maturity or the return on the debt obligation, with the exception of the right of the issuer to redeem the debt obligation or the right of the holder or issuer to extend its term to maturity, and (iii) is payable in cash."

Under this definition, typical equity, commodity linked and currency linked structured notes and ETNs linked to a reference asset will be outside of the bail-in regime. However, as in the U.S. context, market participants need to understand how this definition applies to simpler rate-linked notes (which are sometimes referred to as "lightly structured notes" or "lightly structured rate-linked notes"[4]):

- *Floating rate linked notes linked to CMS*[5]: the second paragraph of the definition above appears to remove these instruments from the definition of "structured note," as CMS is an "interest rate." Accordingly, notes of this kind would be subject to the bail-in regime.
- *Fixed to floating rate notes*[6] appear not to be "structured notes" by virtue of the second paragraph above.
- *Floating rate notes with a capped interest rate and/or a floor*: the second paragraph appears to remove those notes with a minimum interest rate from the definition; however, it is silent as to the impact of a maximum rate.

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- *Step up callable notes*: these appear not to be "structured notes" by virtue of the second paragraph above.

- *Inflation-linked structured notes*[7]: the first paragraph of the definition appears to include this instrument in the "structured note" definition due to its embedded derivative. Since inflation rates are not "interest rates," the second paragraph would not seem to remove them from the definition. Accordingly, these instruments would probably not be subject to the bail-in regime.

- *Range accrual notes linked to an interest rate*,[8] or *notes with a single bullet payment at maturity that is tied to the level of an interest rate*,[9] would appear to be "structured notes" under the first paragraph set forth above.

REQUIRED DISCLOSURES AND DISCLOSURE DOCUMENTS

The offering documents for new instruments must disclose whether those instruments are subject to the bail-in regime. We anticipate that, particularly for notes subject to bail-in, these disclosures would follow the practice of certain European issuers of notes into the U.S. market; that is, the offering documents would include prominent cover page disclosure about the bail-in feature, as well as related risk factor disclosure as to the nature of the bail-in regime.

In a provision that was added to the final rules, a D-SIB may not advertise or otherwise promote an obligation that is subject to the bail-in regime to a purchaser in Canada as a "deposit" or any variation of that term. For example, the name of the instrument cannot be described as a "deposit." Although this provision explicitly references purchasers in Canada, we expect that issuers and their underwriters will apply this restriction to purchasers outside of Canada as well.

REQUIRED CONTRACTUAL AND OTHER TERMS

To facilitate the enforceability of the bail-in power, and to help ensure that any legal issues would be resolved in a Canadian court, an instrument subject to the bail-in regime will need to include the following in its terms:

- the holder of the instrument is bound by the Canada Deposit Insurance Corporation Act, often called the "CDIC Act" (including the conversion of the liability into common shares and the resulting termination of the instrument), and by the laws of Canada or of a province of Canada in respect of the operation of the CDIC Act;

- the holder of the instrument is subject to the jurisdiction of Canadian courts as to the CDIC Act and those laws; and

- the above two bullets are binding on the holder of the liability despite any other terms of the liability, any other law that governs the liability and any other agreement between the parties.

Issuers of registered notes or bank notes would need to amend their indentures (or paying agency agreements, in the case of unregistered programs) and forms of notes to address these terms.

STEPS TO BE TAKEN

Prior to the effective date, Canadian issuers into the U.S. market will need to take a number of steps as to structured notes, such as "lightly structured notes," that are subject to the rules:

- Amending their existing registration statements (or filing new registration statements) to:

  - Add the required bail-in disclosures.

  - Amend and supplement their indentures and forms of notes to include the required bail-in provisions discussed above.[10]

- Updating their forms of pricing supplements and product supplements to include the required disclosures.

- Updating any relevant brochures and marketing materials for the relevant notes to explain the bail-in provisions.

- Underwriters and other distributors of these notes may wish to update the forms of underwriting agreements and program agreements to address the issuer's compliance with the new regulations.

As discussed above, many "structured notes" (such as equity-linked notes) will not be subject to the bail-in regime. Depending upon its issuance plans, an issuer may wish to consider whether it's useful to maintain two separate issuance programs: one program for use

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with notes that are subject to the bail-in regime and to continue to use their existing programs for notes that are not subject to the bail-in regime. For example, an issuer could elect to continue to use an existing shelf registration statement exclusively for notes that are not subject to the bail-in regime until that shelf expires and to establish a new shelf for use with notes that need to comply with the new requirements.

CANADIAN TLAC

In connection with the proposed bail-in regulations in June 2017, OSFI also published for comment its draft Total Loss-Absorbing Capacity Guideline (the "TLAC Guideline"). Similar to U.S. and European regulatory changes, the TLAC Guideline is intended to ensure that D-SIBs have sufficient loss-absorbing capacity to support the recapitalization of a non-viable D-SIB. However, as noted above, final rules have not yet been adapted here.[11]

We thank Kashif Zaman, Financial Services partner of Osler, Hoskin & Harcourt LLP, for his input in connection with this article.

1 Most of the Canadian banks that are D-SIBs have registered note programs in the United States under which they issue structured notes, as well as European issuance platforms. Several banks also have unregistered bank note programs and Rule 144A programs.

2 The regulations set forth detailed provisions as to the bail-in process and valuation, which are beyond the scope of this article.

3 For the avoidance of doubt, a deposit note that is also a "structured note" would not be subject to bail-in.

4 Some examples are briefly described in the following footnotes for the sake of illustration.

5 For example, a floating rate note that pays interest quarterly, based on the level of CMS10, plus or minus a spread.

6 For example, a note that pays interest quarterly, initially at a fixed rate of interest, and then at a rate based on USD 3M LIBOR, plus a spread.

7 For example, a note that pays quarterly interest based on year-over-year changes in the U.S. Consumer Price Index.

8 For example, a note that pays quarterly interest based on the number of days that USD 3M LIBOR is above a certain level.

9 For example, a note that does not pay interest before maturity, but pays a digital coupon at maturity if the CMS10 exceeds a certain level, and is subject to full or partial loss of principal if the CMS10 is less than that level.

10 In the case of unregistered bank note programs and Rule 144A programs, comparable changes would need to be made.

11 A summary of the rules, as originally proposed, may be found in the issue of "Structured Thoughts" linked above.

FINRA ISSUES SWEEP LETTER REGARDING PRODUCTS LINKED TO VIX

In April 2018, Financial Industry Regulatory Authority, Inc. ("FINRA") published a summary of information it had requested in a recent Targeted Examination Letter—also known as a sweep letter—in connection with products linked to the Chicago Board Options Exchange ("CBOE") Volatility Index ("VIX"). "Sweeps" are targeted regulatory exams, which are used to focus examinations and investigations by regulatory agencies. This recent sweep focused on the supervisory processes broker-dealer firms follow in order to identify and mitigate sales practice risks associated with recommendations to retail investors of VIX-linked products, such as unsuitable recommendations, misrepresentations and appropriateness of any required disclosures to customers. In addition, FINRA will also review firms' due diligence processes with respect to product vetting, testing and approval in connection with VIX-linked products.

The sweep letter arrives in the midst of significant scrutiny of the VIX. With stock prices rising somewhat steadily in recent years, volatility has decreased. As a result, investors who were betting on the level of the VIX to decrease during this period (for example, by purchasing "inverse ETNs" linked to the VIX) were enjoying significant profits. However, on February 5, 2018, a significant market correction in U.S. equities caused the level of the VIX to dramatically increase. Investors who purchased inverse VIX products suddenly incurred significant losses. With so much value being lost over such a short period of time, the VIX is now being reviewed as to claims of market manipulation, and the SEC and the CFTC are both investigating trading patterns in the VIX. Some have observed that significant trading spikes have occurred in SPX options shortly before the VIX's monthly settlement is determined. At least one law firm has filed a class action relating to VIX options and futures. And as we noted in our last issue of this publication, SEC commissioner Kara Stein had pointed out the risks to retail investors posed by VIX-linked products and asked whether these investors properly understood what they were purchasing.

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FINRA's "VIX-Linked Product Review" sweep letter seeks from firms, among other things:

- written supervisory procedures, compliance manuals, due diligence process documents, training materials, suitability procedures and other written guidance provided to its registered persons regarding the solicitation, recommendation and supervision of VIX-linked products for approximately the past two years (the "Review Period");

- a statement describing any restrictions with regard to soliciting customer purchases of VIX-linked products;

- list of gross commissions generated related to VIX-linked product purchase and sale activity for the Review Period, including the top branch offices, registered representatives, retail customer accounts and retail customers based upon activity within their "household";

- a copy of all VIX-linked securities transactions effected within accounts of retail customers during the Review Period;

- every retail customer account that the firm has held a VIX-linked product in approximately the last six months;

- if VIX-linked products are tested on the firm's platform, a description of the firm's business process for testing, including the testing methodology, supporting documentation in connection with the tests, conclusions reached and actions performed to mitigate any risks associated with potential recommendations of VIX-linked products to retail clients, and, if VIX-linked products are not tested, a description of the actions taken in order to determine how VIX-linked products would perform under various market conditions;

- if customers are permitted to trade VIX-related options the morning of any VIX settlement, a description of the firm's controls to review the timely entry of pre-market orders and overall activity by the firm's customers and traders; and

- copies of any customer complaints concerning VIX-linked products held in, purchased or sold through any account and any alleged cancelled pre-market options orders or concerning a customer's inability to enter pre-market options trades relating to VIX-linked products.

As the firms that received this sweep request gather responsive information, they should take a comprehensive look at their procedures for supervisory processes to mitigate sales practice risks and should determine whether these procedures are adequate sufficiently documented and whether their registered representatives, associated persons and compliance personnel are adequately trained to apply these procedures.

For additional information on FINRA's sweep letters, releases and other publications relating to structured products, please see our FINRA Materials page, which may be found at the following link: https://www.mofo.com/special-content/structured-products/FINRA-Materials.html.

PRICING "ABOVE THE RANGE" IN STRUCTURED PRODUCT OFFERINGS

As readers of this publication know, red herrings for many retail structured notes and structured CDs provide a ranged term. For example, depending on the product terms, the red herring may set forth a range of maximum returns, interest rates or a participation rate. Alternatively, and perhaps slightly less frequently, the red herring may contain a range of a term on the downside performance of the reference asset, such as a barrier level or buffer level. This term is set on the pricing date, based on market conditions on the pricing date, and the terms that the issuer can receive in connection with a related hedging transaction.

Many broker-dealers who offer structured notes will do so based on this range. For example, an investor may place an order, or an "indication of interest," for the relevant note based on the information in the red herring. On the pricing date, the broker-dealer will accept these offers, and the order will convert into a purchase and sale, so to speak.[1]

If any material term changes to the detriment of the investor on the pricing date, the broker-dealer will need to convey that information to the investor prior to accepting the order, so that the investor can consider that new information. This could occur, for example, if one of the ranged terms will end

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up at a level that is worse for the investor than the range contemplated by the red herring. (Or, for example, if the estimated initial value of the notes is lower than the range contemplated by the red herring.) In some cases, it may be necessary to recirculate and refile the red herring.

However, what happens if the terms at pricing improve as compared to what was contemplated by the red herring? For example, the maximum return of a note may end up higher than the red herring initially contemplated.

In such a case, it is not necessary to alert the investors of the change prior to accepting orders or to recirculate the red herring with the new terms. (This is the case, of course, only if no terms are changing to the detriment of the investor.) That being said, as a best practice, the relevant financial advisors will likely wish to advise the relevant accounts of the improvement to the final terms; doing so may help, for example, avoid any confusion if the investor compares the final offering document to the red herring.

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1 For an additional discussion of this process, see our article "Conditional Offers to Buy" in the December 13, 2016 issue of this publication (https://media2.mofo.com/documents/161213-structured-thoughts.pdf).

IRS EXTENDS DEADLINE FOR WITHHOLDING AND REPORTING PARTNERSHIP DIVIDEND EQUIVALENT PAYMENTS

On March 15, 2018, the Internal Revenue Service added General Compliance FAQ 23 to its FAQs on Qualified Intermediaries/Withholding Foreign Partnerships/Withholding Foreign Trust. Previously, withholding agents were required to withhold and report any dividend equivalent payments made with respect to a derivative referencing a partnership on IRS Forms 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons) and 1042-S (Foreign Person's U.S. Source Income Subject to Withholding) by March 15, 2018.

FAQ 23 provides that for the 2017 calendar year, withholding agents will not be subject to interest, penalties or additions to tax provided that such withholding agents withhold and report on IRS Forms 1042 and 1042-S for dividend equivalent payments made with respect to a derivative referencing a partnership by September 17, 2018. The September 17, 2018 extension is much welcomed relief. It is responsive to requests from finance industry trade groups to the Department of the Treasury for additional time for compliance. Withholding and reporting dividend equivalent payments made with respect to a derivative referencing a partnership can be challenging, because some partnerships may not provide the necessary information for withholding and reporting until their K-1s are available.

FAQ 23 provides a one-time extension for the 2017 calendar year. It remains to be seen whether such an extension will be made permanent in future years.

SEC PANEL DISCUSSES RETAIL INVESTOR DISCLOSURE AND EDUCATION

On April 9, 2018, the SEC's Fixed Income Market Structure Advisory Committee conducted an open meeting.[1] The meeting focused on block trade dissemination, liquidity considerations for bond ETFs, electronic trading in the retail market and retail customer disclosure and education. The discussion about retail customers is of particular interest to the structured products industry. Panelists included:

- Robert Colby, Chief Legal Officer, FINRA
- Melissa Gainor, Senior Special Counsel, Division of Investment Management, U.S. Securities & Exchange Commission
- Nick Goetze, Managing Director, Fixed Income Services, Raymond James
- Gary Mottola, Research Director, FINRA Investor Education Foundation

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Panelists reported a continuing lack of knowledge on the part of many retail investors, who in many cases are not familiar with a variety of basic concepts relating to debt securities. In addition, notwithstanding the industry's efforts to educate investors, whether through "plain-English disclosures" in offering documents or by providing seminars and educational materials, some investors may feel overwhelmed by the amount of information available, in light of the amount of time they have available to read and absorb it.

Accordingly, panelists also discussed the significant role that financial advisors have to play with respect to debt securities offered to retail investors. For the debt "eco-system" to properly function for the benefit of retail investors, these advisors must properly discharge the suitability obligations imposed by FINRA's rules, particularly as to complex instruments. These financial advisors must be adequately trained and supervised as to the products that they are authorized to sell.

1 The agenda for the meeting may be found at the following link: https://www.sec.gov/news/press-release/2018-60.

ESMA TEMPORARY PRODUCT INTERVENTION MEASURES FOR CFDS AND BINARY OPTIONS

The European Securities and Markets Authority (ESMA) has decided to impose temporary product intervention measures on the provision of certain derivative products to retail investors in the European Union.

This represents the first time that ESMA has flexed its muscles under the new product intervention power provided by Article 40 of Regulation (EU) No. 600/2014 (MiFIR). In this case, ESMA's specific target is the provision of contracts for differences (CFDs), and binary options to retail investors. ESMA had previously flagged this possible action, by an announcement in December 2017 that it was considering a possible use of its powers for these types of products and by subsequently publishing a call for evidence on 18 January 2018, detailing the restrictions that it was considering imposing and inviting views on certain aspects.

For the purpose of this product intervention, a CFD is considered to be "any derivative other than an option, future, swap or forward rate agreement, the purpose of which is to give the holder a long or short exposure to fluctuations in the price, level or value of an underlying asset, irrespective of whether it is traded on a trading venue, and that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event."

ESMA has determined that the following provisions are appropriate in relation to CFDs:

- Leverage limits on the opening of a CFD by a retail client, ranging from a leverage-to-initial-margin ratio of 30:1 to 2:1, which limits will vary according to the volatility of the underlying asset or index:
  - 30:1 for major currency pairs;
  - 20:1 for non-major currency pairs, gold, and major indices;
  - 10:1 for commodities other than gold and non-major equity indices;
  - 5:1 for individual equities and other reference values; and
  - 2:1 for cryptocurrencies.
- A margin closeout rule on a per-account basis. This rule will standardize the percentage of margin (at 50% of the minimum initial required margin) at which providers are required to close out one or more of a retail client's open CFDs. This is intended to prevent certain providers from allowing retail clients' initial margin to be eroded to such a point that those providers increase the risk of clients losing more than the amount they invested;
- Negative balance protection on a per-account basis, in order to provide an overall guaranteed limit on retail client losses;

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- A restriction on the incentives offered to trade in CFDs (such as bonuses contingent on executing a certain volume of trades); and
- A firm-specific risk warning from a CFD provider, delivered in a standardized way. The risk warning would have to be included on any communication to, or publication accessible by, a retail investor and would be required to state the percentage of the provider's retail-client CFD trading accounts that lost money over the preceding 12-month period.

ESMA has specifically noted similarities between CFDs as defined above on the one hand, and on the other hand warrants and turbo certificates, but considers the products to also differ in various respects. ESMA has stated its intention to closely monitor the latter products to determine whether similar detrimental consequences may develop for retail investors from these products.

However, ESMA believes that the above definition of a CFD does not explicitly exclude securitized derivatives, on the basis that the wrapper of a security and its tradability on a trading venue do not materially change the key characteristics of a CFD.

As noted above, with respect to CFDs that have cryptocurrencies as underlying assets, ESMA has declared a 2:1 leverage limit on the opening of a CFD. However, ESMA has also noted that it and various national competent authorities within the EEA have significant concerns about the integrity of the price formation process in underlying cryptocurrency markets, given that cryptocurrencies are a relatively immature asset class. It believes that such unreliability in the price formation process makes it inherently difficult for retail clients to value these products. ESMA and other regulators have already warned of the risks involved in investing in cryptocurrencies themselves and, for CFDs on cryptocurrencies, they note that many of these concerns remain. As a result, ESMA intends to closely monitor the market for financial instruments – including CFDs – that provide exposure to cryptocurrencies in order to assess whether stricter measures are required for this asset class.

Separately from CFDs, ESMA has decided upon an absolute prohibition of the marketing, distribution or sale of binary options to retail investors. ESMA has concluded that, unlike other options that can provide hedging for exposure to certain assets, binary options "do not meet any genuine investment needs for retail investors" and are inherently similar to gambling products, thereby also (in some cases) attracting compulsive gambling behavior.

Once these measures have been translated into the official languages of the EU, ESMA will publish an official notice on its website, and the measures will be published in the Official Journal of the EU. The prohibition of binary options will commence one month after such publication, and the restrictions in relation to CFDs will commence two months after such publication.

Both the above CFD restrictions and the binary option prohibition, once they commence, will last for an initial three-month period. These restrictions and prohibitions can also be renewed by ESMA for another, similar period, at the end of their initial three-month periods, and this extension can allow time for permanent restrictions and prohibitions to be adopted by national competent authorities within the EEA. The Financial Conduct Authority in the UK has already indicated that it expects to launch a consultation on whether to apply these restrictions and prohibitions on a permanent basis.

FCA STATEMENT ON CRYPTOCURRENCY DERIVATIVES

On 6 April 2018, the UK Financial Conduct Authority (FCA) stated that, while cryptocurrencies themselves are not currently regulated by the FCA (provided they are not part of other regulated products or services), cryptocurrency derivatives are capable of being financial instruments under the EU's Markets in Financial Instruments Directive (Directive 2014/65/EU). Therefore, firms conducting regulated activities by way of business in the UK in relation to cryptocurrency derivatives must generally obtain authorization and comply with all applicable rules in the FCA's Handbook, as well as directly applicable EU regulations.

The FCA states its view that dealing in, arranging transactions in, advising on, or providing other services

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that amount to regulated activities in relation to derivatives that reference either cryptocurrencies or tokens issued through an initial coin offering are all likely to require authorization by the FCA. In its view this includes:

- cryptocurrency futures—derivative contracts in which each party agrees to exchange cryptocurrency at a future date and pre-agreed price;
- cryptocurrency CFDs—cash-settled derivative contracts in which the parties to the contract seek to secure a profit or avoid a loss by agreeing to exchange the difference in price between the cryptocurrency CFD contract at its outset and at its termination; and
- cryptocurrency options—contracts that grant the beneficiary the right to acquire or dispose of cryptocurrencies.

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