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Session VIII

Global Regulatory Update

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LIBOR Transition

OVERVIEW

- An estimated $350 trillion of financial contracts and securities tied to LIBOR
- **End of 2021**: LIBOR to be discontinued
- **Prior to End of 2021**:
  - Pre-cessation trigger
    - If LIBOR becomes non-representative
- **After 2021:**
  - Zombie LIBOR

LIBOR DIFFERS FROM ITS REPLACEMENTS

- LIBOR is unsecured inter-bank lending rate
- SOFR is secured overnight rate considered risk free
- LIBOR is available in various terms (*e.g.*, one month, 3 months, etc.)
- SOFR will not have term rate until sometime in 2020

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LEGACY CONTRACTS

- Existing instruments that will mature after the cessation of LIBOR
- Bilateral instruments
- Securitizations
- Floating rate notes
- MBS
- Derivatives
  - Protocol

NEW INSTRUMENTS

- Referencing LIBOR
  - AARC recommendations for robust fallback language:
    - Clearly defined trigger events (*e.g.*, actual cessation of LIBOR)
    - A fallback reference rate
    - Spread adjustments
    - A consent process, if applicable
  - Recommendations available for FLNs, securitizations, syndicated loans, and bilateral business loans. MBS on the way
- Amendment vs hardwire
- ISDA fallback language for derivatives

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KNOWN UNKNOWNS

- Tax impact
  - IRS relief from adverse tax consequences for debt instruments, derivatives, and REMICs, among others
  - Early reliance on proposed regulations
- Swaps margining and clearing
  - CFTC expected to provide guidance/relief
    - Uncleared swap margin relief
    - SOFR clearing mandate

PLAN OF ACTION

- Inventory
- Prepare to amend or sell
- For derivatives, ISDA protocol likely will be an option
- SEC staff issued recommendations to help market participants effectuate a transition away from LIBOR
  - **Do not** wait on answers to open questions
  - For funds:
    - Consider how to disclose risks to investors
    - Assess impact of LIBOR transition on liquidity of fund investments

Brexit Update

BREXIT UPDATE

Then – Boris Johnson: “do or die” Brexit on 10/31

Now - EU grants extension to January 31, 2020

- Bill passed to hold elections on 12 December; could change path if Labour party gains majority (or not!)
- “*Anyone who predicts with alacrity the outcome of the Brexit saga is either an extraordinarily sophisticated person, or a rank fool.*” (John Bercow, recently retired Parliament speaker, CBS’ *60 Minutes*©, 11/3/2019)

BREXIT UPDATE – ASSET MANAGERS

- If <u>no</u> Brexit deal with EU (i.e., a “hard Brexit”):
  - No passports under MiFID, UCITS, AIFMD
    - UK-domiciled UCITS funds become AIFs under AIFMD
  - British-based firms may lose approved status under directives as issuers or service providers
    - Examples: UCITS investment restrictions on investments in firms located in non-member states would/will apply
  - Most large asset management operations migrating to Ireland & Luxembourg; Netherlands and France gain as well

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BREXIT UPDATE – CLIENT SCENARIOS

Portfolio Management	• Delegation of portfolio management of a segregated mandate by an EU manager to a UK investment manager • Delegation of portfolio management of a UCITS/AIF by an EU manager to a UK investment manager
Marketing Product	• Marketing of EU UCITS and EU AIFs in the UK post Brexit by an EU management company • Marketing of UK UCITS and UK AIFs in the EU by a UK manager
Marketing Activity	• EU Investment Manager carrying out marketing activity in the UK • UK Investment Manager carrying out marketing activity in the EU

Australia – Class Order Relief

AUSTRALIA – CLASS ORDER RELIEF

- FFSPs have enjoyed special exemption for 15+ years
- Removal of relief for current FFSPs in Australia
- New Requirements for FFSPs to:
  - obtain a “Foreign AFSL” from 30 September 2019 onwards
  - or become authorised under an existing AFSL
- No new exemptions from September 2019
- Estimate of 300+ US managers with exemptions

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AUSTRALIA - CLASS ORDER RELIEF

- Consultation paper proposing modifications to current class order relief
- Extends availability of current relief from September 2019 to March 2020
- FFSPs then have until March 2022 to either obtain a Foreign AFS license, or apply for new Funds Management Relief

July 2019

Practice Group(s):
Investment Management

ASIC Changes Course on Proposals for Relief for Foreign Financial Services Providers

By Jim Bulling, Felix Charlesworth, Andrew Fay

The Australian Securities and Investments Commission (**ASIC**) released on 3 July 2019 Consultation Paper 315: Foreign financial service providers (**CP 315**) which seeks feedback on the proposed introduction of a modified Australia Financial Services (**AFS**) Licencing regime for foreign financial service providers (**FFSPs**).

The proposals contained in CP 315 are significantly different to those contained in the earlier Consultation Paper 301 (**CP 301**) in June 2018 in which it proposed to repeal the conditional relief available to FFSPs (**FFSP Relief**) and implement a modified form of AFS Licence for FFSPs. For further details about ASIC's proposals as outlined in CP 301, please read our previous article here.

SEC Registration of EU-Based Managers

SEC REGISTRATION OF EU-BASED MANAGERS

- SEC not permitting managers located in a GDPR jurisdiction to register as an investment adviser
- SEC concerned that GDPR would not permit access to EU-based adviser’s books and records or permit on-site inspections
- GDPR permits processing for reasons of “public interest” of the EU or an EU Member State, or as otherwise necessary for the establishment, exercise of defense of legal claims in the EU.
    - SEC believes these derogations are do not extend to US law or US public interest

Other Global Regulatory Updates

OTHER GLOBAL REGULATORY UPDATES

- ESMA Consultation Paper on Performance Fees in UCITS (July 2019)
  - Central Bank of Ireland thematic review 9/2018
- EU Directive & Regulations on the Cross-Border Distribution of Funds (to be applied effective 2 August 2021):
  - Defining and permitting “pre-marketing” of AIFs (AIFMD)
  - Removing local paying/info agent requirements for UCITS
  - Introduction of a single online access point for information on national rules related to fund marketing requirements and applicable fees
  - Standardization of procedures for termination of marketing notifications
  - The introduction of new powers for regulators to require the pre-authorisation of marketing communications by UCITS managers or AIFMs which market AIFs to retail investors

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