SHEARMAN & STERLING

FINANCIAL REGULATORY DEVELOPMENTS FOCUS

JUN 20, 2018
ISSUE 24/2018

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

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AML/CTF, Sanctions and Insider Trading

EU Agrees Countering Money Laundering by Criminal Law Directive

On June 7, 2018, the Council of the European Union and the European Parliament announced their agreement on new EU criminal sanctions for money laundering. The proposed Countering Money Laundering by Criminal Law Directive will complement the Fifth Money Laundering Directive, which was adopted in May 2018.

The new Directive establishes minimum rules on the definition of criminal offences and sanctions in the area of money laundering. Member states will be required to implement national laws providing for money laundering offences by individuals to be punishable by a maximum term of imprisonment of at least four years. National laws will continue to provide for additional measures, such as fines, temporary or permanent exclusion from public tender procedures, grants and concessions, and national laws will also provide for national courts to take into account any aggravating factors for sentencing.

In addition, the new Directive establishes corporate liability for money laundering in certain circumstances and provides for corporates to face various sanctions, such as exclusion from entitlement to public benefits or aid, temporary or permanent exclusion from public tender procedures, grants and concessions, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up and temporary or permanent closure of the establishments used for committing the offence.

The new Directive also includes rules for establishing jurisdiction and for cross-border cooperation between member states.

The U.K., Ireland and Denmark will not adopt the new Countering Money Laundering by Criminal Law Directive. In the U.K., this follows the approach in relation to EU criminal sanctions for market manipulation where the U.K. has implemented its own national regime instead.

The new Directive must now be formally adopted by the Council and Parliament. It will enter into force 20 days after it has been published in the Official Journal of the European Union and member states will have up to 24 months to transpose the new provisions into national law.

Parliament's press release is available at: http://www.europarl.europa.eu/news/en/press-room/20180605IPR05049/eu-wide-penalties-for-money-laundering-deal-with-council.

Council's press release is available at: http://www.consilium.europa.eu/en/press/press-releases/2018/06/07/eu-agrees-new-rules-to-make-sure-money-laundering-criminals-are-punished/pdf?_sm_au_=iVVTRnDvR5rsNrvq.

Details of the agreed Fifth Money Laundering Directive are available at: https://finreg.shearman.com/eu-fifth-money-laundering-directive-adopted.

Bank Prudential Regulation & Regulatory Capital

US Office of the Comptroller of the Currency Issues Clarifications Regarding CRA Evaluation

On June 15, 2018, the U.S. Office of the Comptroller of the Currency issued clarifying guidance with respect to the examination and evaluation of institutions under the Community Reinvestment Act. The bulletin issued by the OCC notes that clarifications with respect to CRA evaluation processes were previously communicated to examiners, and that effective June 1, 2018, the OCC rescinded its previous "Large Bank CRA Examiner Guidance," issued December 29, 2000 (OCC Bulletin 2000-35). The OCC bulletin provides clarification with

respect to a number of aspects of the CRA evaluation process, including the frequency and timing of CRA performance evaluations, the applicable CRA performance evaluation period, full-scope and limited-scope reviews, the evaluation of various components of CRA evaluations and the timing for the finalization of CRA performance evaluations when there is an open investigation regarding potential discriminatory or other illegal credit practices. The OCC bulletin also outlines the guidance provided to examiners with respect to CRA evaluations, including the factors to consider in the evaluation process, communication with supervised institutions during the evaluation process and the presentation and analysis of performance data.

The full text of the OCC bulletin is available at: https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-17.html.

US Federal Reserve Board Approves Final Rule Regarding Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations

On June 14, 2018, the U.S. Board of Governors of the Federal Reserve System approved a final rule, which implements section 165(e) of the Dodd-Frank Act and establishes single-counterparty credit limits for bank holding companies and foreign banking organizations with $250 billion or more in total consolidated assets (including any U.S. intermediate holding company of these FBOs with $50 billion or more in total consolidated assets) and any other bank holding company classified by the Federal Reserve Board as a Global Systemically Important Bank.

Under the final rule, a U.S. GSIB cannot have aggregate net credit exposure to another single global systemically important banking organization or a nonbank financial company supervised by the Federal Reserve Board that exceeds 15% of its tier 1 capital, and cannot have aggregate net credit exposure that exceeds 25% of its tier 1 capital to any other counterparty (defined under the final rule to include a company (including any consolidated affiliates of the company); a natural person (including the person's immediate family collectively where the exposure to the natural person exceeds 5% of the institution's tier 1 capital); a U.S. state (including all of its agencies, instrumentalities, and political subdivisions); foreign sovereign entities that are not assigned a zero risk weighting under the risk-based capital rules (including their agencies and instrumentalities); and political subdivisions of foreign sovereign entities (including their agencies and instrumentalities)). Other financial institutions subject to the final rule (other than U.S. IHCs subject to the rule) cannot have aggregate net credit exposure to any other counterparty that exceeds 25% of an institution's tier 1 capital.

The combined U.S. operations of FBOs with $250 billion or more in total consolidated assets are also subject to these credit limits, but the FBO may comply by certifying that it is subject to consolidated credit limits established by its home country supervisor that are consistent with the Basel Committee's large exposure framework.

The final rule also establishes three tiers of credit limits for U.S. IHCs whose parent FBOs have $250 billion or more in total consolidated assets. U.S. IHCs with at least $50 billion but less than $250 billion in total consolidated assets cannot have aggregate net credit exposure to any other counterparty that exceeds 25% of the IHC's total regulatory capital plus the balance of its allowance for loan and leases losses not included in tier 2 capital under the capital adequacy guidelines. U.S. IHCs with $250 billion or more but less than $500 billion in total consolidated assets cannot have aggregate net credit exposure to any other counterparty that exceeds 25% of the IHC's tier 1 capital. Similar to the limits imposed on U.S. GSIBs, U.S. IHCs with $500 billion or more in total consolidated assets, cannot have aggregate net credit exposure to another single GSIB or a nonbank financial company supervised by the Federal Reserve Board that exceeds

15% of its tier 1 capital, and cannot have aggregate net credit exposure to any other counterparty that exceeds 25% of its tier 1 capital.

The final rule will take effect 60 days from its publication in the Federal Register. The compliance deadline for GSIBs will be January 1, 2020. For all other institutions, the compliance deadline will be July 1, 2020.

In connection with the final rule, the Federal Reserve Board issued a notice and request for comments with respect to a proposed reporting template (proposed reporting form FR 2590) to monitor compliance by the institutions covered under the final rule. The proposed form includes nine schedules that broadly cover the gross exposure of the respondent institutions to various counterparties, eligible collateral and risk mitigating factors and disclosure of certain counterparties whose risk must be aggregated under the final rule. The notice requests comments with respect to various aspects of the proposed form including whether the form is necessary and whether it can be improved, the accuracy of the estimated burdens imposed by the proposed reporting requirement and the estimated compliance costs in connection with the proposed reporting requirement. Comments to the proposal will be due 60 days from its publication in the Federal Register.

The full text of the final rule is available at:
https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180614a1.pdf.

The full text of the reporting template proposal is available at:
https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180614a2.pdf.

US Comptroller of the Currency Discusses Agency Priorities before House and Senate Committees

On June 13 and 14, 2018, U.S. Comptroller of the Currency Joseph M. Otting discussed the priorities of the OCC before the U.S. House Financial Services Committee and U.S. Senate Committee on Banking, Housing, and Urban Affairs. Comptroller Otting identified the following as his key priorities: modernizing the OCC's approach to the Community Reinvestment Act, encouraging institutions to meet the short-term, small-dollar credit needs of their customers, enhancing Bank Secrecy Act and anti-money laundering compliance, simplifying regulatory capital requirements, simplifying the Volcker Rule and promoting efficacy and efficiency in the supervisory activities of the OCC.

The full text of Comptroller Otting's prepared testimony before the two committees is available at:
https://www.occ.treas.gov/news-issuances/congressional-testimony/2018/pub-test-2018-60-written.pdf,
https://www.occ.treas.gov/news-issuances/congressional-testimony/2018/pub-test-2018-61-written.pdf and
https://www.occ.treas.gov/news-issuances/congressional-testimony/2018/pub-test-2018-61-oral.pdf.

Bank of England Confirms its Approach to Setting Internal MREL in Groups

On June 13, 2018, the Bank of England published a Policy Statement setting out its feedback to the responses it received to its October 2017 consultation on its approach to setting a minimum requirement for own funds and eligible liabilities. MREL is a minimum requirement for firms to maintain equity and eligible debt liabilities that can bear losses before and in resolution and results in a top-up to standard regulatory capital requirements, similar in concept to the old Tier 3 requirements under Basel II. The requirement will apply to U.K. authorized banks, building societies and PRA-designated investment firms, parent undertakings of those firms that are financial holding companies and to U.K. authorized subsidiaries of such firms. The MREL requirement is the EU implementation, in the Bank Recovery and Resolution Directive, of the standard for total loss-absorbing capacity (TLAC) set by the Financial Stability Board.

The BoE's October 2017 consultation set out proposals for changes to the BoE's 2016 Statement of Policy on its approach to setting "external" MREL for resolution entities, to include the BoE's approach to "internal" MREL, i.e. instruments that are issued to a resolution entity from other legal entities in a group. Internal MREL

is intended to cover U.K.-headquartered banking groups as well as U.K. subsidiaries of overseas banking groups.

The BoE is implementing its proposals largely as consulted on. However, it has made some small revisions to clarify internal MREL instrument eligibility, external MREL instrument eligibility and clean holding company requirements. Having considered consultation responses, the BoE will not be proceeding with its original proposal in the October 2017 consultation that critical service providers supporting the delivery of the group's critical functions must maintain financial resources equivalent to at least 25% of the annual operating costs of providing services. The BOE has also decided not to set requirements around the location and the form of surplus MREL at this stage.

The BoE will set MREL on a firm-by-firm basis. It will communicate in the second half of 2018 the interim internal MREL which it expects to apply from January 1, 2019 for relevant subsidiaries of G-SIBs, subject to an EU joint decision for relevant subsidiaries on the basis of the revised Statement of Policy. The BoE plans to communicate in early 2019 the interim internal MREL it expects to apply from January 1, 2020 for relevant subsidiaries of non-G-SIBs, subject to an EU joint decision process for relevant subsidiaries on the basis of the revised Statement of Policy.

Given that external and internal MREL must be set on an annual basis, the Bank will engage with institutions at this time, as well as on an ongoing basis, to consider whether the transitional arrangements for meeting the interim or end-state MRELs remains appropriate.

The Policy Statement is available at: https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/policy-statement-boes-approach-to-setting-mrel-2018.pdf.

The updated Statement of Policy is available at: https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/statement-of-policy-boes-approach-to-setting-mrel-2018.pdf?la=en&hash=BC4499AF9CF063A3D8024BE5C050CB1F39E2EBC1.

Details of the October 2017 consultation are available at: https://finreg.shearman.com/bank-of-england-launches-consultation-on-setting-.

UK Prudential Regulator Confirms its Approach to MREL Reporting

On June 13, 2018, the U.K. Prudential Regulation Authority published a Policy Statement on reporting MREL and an updated Supervisory Statement "Resolution Planning," following a consultation which ran from January 8 to April 9, 2018.

The PRA is implementing its proposals largely as consulted on. However, due to queries from some respondents on the frequency of reporting and on the draft reporting templates and guidance, the PRA has made some minor amendments to provide clarification on the reporting templates and guidance and some changes to reflect the fact it will take a more proportionate approach to the frequency of reporting so as to not place a disproportionate burden on certain firms.

The updated Supervisory Statement on Resolution Planning sets out the PRA's expectations on the information firms should provide in relation to their MREL requirement. The PRA will share the information received with the U.K.'s resolution authority, the Bank of England. The PRA intends to use the information received to monitor a firm's progress in complying with its MREL requirement and to assess whether a firm is, or is likely to be, in breach of its MREL requirement.

The updated Supervisory Statement will apply from January 1, 2019. Returns must be submitted using the BoE's Electronic Data Submission portal, BEEDS, which the BoE will make available by that time.

The Policy Statement (PRA PS 11/18) is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps1118.pdf, the reporting guidance and links to reporting templates are available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps1118app2guidance.pdf, the updated Supervisory Statement (SS 19/13) is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss1913-update.pdf and details of the January 2018 consultation are available at: https://finreg.shearman.com/uk-prudential-regulation-authority-proposes-mrel-.

Derivatives

EU Report on Penalties Under the European Market Infrastructure Regulation

On June 13, 2018, the European Securities and Markets Authority published its first annual report on penalties imposed by national regulators for infringement of obligations under the European Market Infrastructure Regulation. The report focuses on supervisory measures and penalties imposed by EU national regulators in relation to the EMIR clearing obligation, the reporting obligation, obligations on non-financial counterparties and the risk mitigation techniques for uncleared derivatives. The obligations on CCPs and Trade Repositories are out of scope of the report.

The report has been provided to the European Commission, the Council of the European Union and the European Parliament. ESMA notes that the report can be used to identify best practices as well as areas which might benefit from increased harmonization.

Overall, ESMA found that national regulators have adopted similar approaches to supervising and monitoring compliance with EMIR. Two areas where there is less harmonization are the amounts of fines, which range from EUR 125 to EUR 100 million, and whether a member state has provided for criminal sanctions. ESMA notes that it has launched a Sanctions Register for national regulators to report future sanctions imposed under EMIR.

ESMA notes that national regulators do not appear to have prioritized specific supervisory action over third-country entities' trading contracts with substantial effect in the EU and which are subject to the clearing obligation and states that this could be a point for future consideration.

Finally, ESMA encourages national regulators to publish regular reports on the effectiveness of the penalty rules under EMIR.

The report is available at: https://www.esma.europa.eu/press-news/esma-news/esma-reports-penalties-and-supervisory-measures-under-emir and the Sanctions Registry is available at: https://registers.esma.europa.eu/publication/searchSanction.

Enforcement

US Federal Banking Regulators Issue Policy Statement on Coordination of Enforcement Actions

On June 12, 2018, the Federal Reserve Board, OCC and U.S. Federal Deposit Insurance Corporation issued a policy statement with respect to notification and coordination of formal enforcement actions. The policy statement was issued in response to the rescission of the Federal Financial Institutions Examination Council's "Interagency Coordination of Formal Corrective Action by the Federal Bank Regulatory Agencies" revised

policy statement, which was issued on February 20, 1997. The interagency policy statement provides that when a federal banking regulator determines that it will take a formal enforcement action against any federally insured depository institution, depository institution holding company, non-bank affiliate, or institution-affiliated party, the agency should consider whether the enforcement action involves the interests of another federal banking regulator. If it is determined that the enforcement action does involve the interest of another federal banking regulator, the agency proposing the enforcement action should notify the other relevant federal banking agency or agencies at the earlier of when written notification is provided to the subject financial institution regarding the enforcement action, or when the respective agency determines that an enforcement action is expected to be taken. If it is determined that the enforcement action does involve the interest of another federal banking regulator, the agency proposing the enforcement action should provide sufficient information to allow the other federal banking regulator to take necessary action in examining or investigating the financial institution or institution-affiliated party. The policy statement also considers what information should be shared among federal financial regulators, and that efforts should be coordinated when multiple agencies are considering bringing complementary enforcement actions. The policy statement is applicable as of June 12, 2018.

The full text of the interagency policy statement is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-06-12/pdf/2018-12556.pdf.

FinTech

UK Regulator Sets out Good Practice for Handling Financial Crime Risks from Crypto-Assets

On June 11, 2018, the U.K. Financial Conduct Authority published a "Dear CEO" letter to U.K. authorized banks, setting out its views on best practice that banks should adopt for handling the financial crime risks that may be posed by so-called crypto-assets. The FCA uses this term to refer to any publicly available electronic medium of exchange that features a distributed ledger and a decentralized system for exchange. Crypto-assets include crypto-currencies, a well-known example of which is Bitcoin. The FCA acknowledges that crypto-assets can be used without any criminal motives. However, the fact that crypto-assets can be held relatively anonymously and can be readily transferred between countries can make them attractive for criminal purposes. Banks should adopt proportionate measures to mitigate the risk that they are used to facilitate financial crimes involving crypto-assets.

The FCA recommends that banks conduct enhanced scrutiny of clients and those clients' activities in cases where the bank provides banking services in the following circumstances:

- banking services are provided to a client that is a crypto-asset exchange, effecting conversions between crypto-currency and fiat currency or between different crypto-currencies;
- the bank has a trading relationship with a client or counterparty whose source of wealth arises or is derived from crypto-assets; or
- the bank is arranging or advising on an initial coin offering.

In the above circumstances, the FCA recommends various steps that banks may take, including ensuring that the bank's internal financial crime framework adequately reflects risks from crypto-asset-related activity, engaging with clients to understand the nature and risks of their business and conducting appropriate staff training. Due diligence should be undertaken on key individuals and on clients involved in ICOs. Where a client is offering crypto-asset exchange services, the adequacy of the client's own due diligence procedures should also be assessed.

Banks should assess the risks posed by customers whose wealth may have resulted from holding, selling or trading crypto-assets, by applying, in a risk-sensitive way, the existing criteria for checking the source of wealth or funds. The FCA is clear that the fact that the evidence trail for transactions involving crypto-assets may be weaker does not justify banks using a different evidential test for checking the source of wealth or funds. The FCA also considers that, where a client or customer is using a state-sponsored crypto-asset which is designed to evade international financial sanctions, this should be viewed as a high-risk factor.

The FCA refers banks to the Financial Services Authority's 2012 findings following a thematic review of the way banks handled investment fraud risk, as the discussion of good and poor practice outlined in those findings is also relevant to the risks retail customers may face when contributing sums to ICOs.

The "Dear CEO" letter is available at: https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-cryptoassets-financial-crime.pdf and the FSA's thematic review findings on investment fraud are available at: http://www.fsa.gov.uk/static/pubs/other/banks-defences-against-investment-fraud.pdf.

Funds

UK Implementing Regulations for the Money Market Funds Regulation Published

On June 11, 2018, the Money Market Funds Regulations 2018 were laid before Parliament and will enter into force partly on June 28, 2018 and fully on July 21, 2018. The EU Money Market Funds Regulation came into force on July 20, 2017 and will apply directly across the EU from July 21, 2018. MMFs are fund vehicles that invest in highly liquid short-term debt instruments, such as government bonds, often used by institutions as a short-term cash management function as an alternative to bank deposits. The effect of the MMFR in the U.K. will be that authorized unit trusts, authorized contractual schemes, open-ended investment companies and alternative investment funds can all apply to be authorized as MMFs.

The MMFR does not require transposition into the national law of EU Member States. However, U.K. legislation must be amended to empower the FCA to authorize funds as MMFs, to levy fees and to enforce requirements under MMFR.

The Regulations make the following changes to U.K. primary and secondary legislation:

- Amendments to the provisions of the Financial Services and Markets Act 2000 on the FCA's powers of authorization and intervention in relation to unit trusts and contractual schemes. The amendments will enable existing authorized unit trusts or authorized contractual schemes to apply for authorization as a MMF and for funds newly applying to become authorized unit trusts or authorized contractual schemes to make a simultaneous application for authorization as a MMF.
- Amendments to the Open-Ended Investment Companies Regulations 2001. The amendments will enable existing open-ended investment companies to apply for authorization as a MMF and for funds newly applying for authorization as an open-ended investment company to be authorized as an open-ended investment company which is also a MMF.
- Amendments to the Alternative Investment Fund Managers Regulations 2013 to provide the FCA with powers in relation to applications for AIFs to be authorized as MMFs, including a procedure for refusal and revocation of MMF authorization.
- Amendments to the Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013. These amendments are necessary to enable the FCA to enforce requirements imposed by the MMFR.

From the date of application of the Regulations, asset management firms will be required to pay fees to the FCA associated with the authorization of MMFs. The FCA consulted on fees and other changes to its Handbook in a consultation which closed on March 23, 2018.

The Money Market Funds Regulations 2018 (S.I. 2018/698) are available at: http://www.legislation.gov.uk/uksi/2018/698/pdfs/uksi_20180698_en.pdf.

The explanatory memorandum is available at: http://www.legislation.gov.uk/uksi/2018/698/pdfs/uksiem_20180698_en.pdf.

Details of the FCA consultation on changes to its Handbook are available at: https://finreg.shearman.com/uk-financial-conduct-authority-proposes-handbook-.

MiFID II

UK Prudential Regulator Confirms Algorithmic Trading Expectations

On June 15, 2018, following its consultation in February 2018, the PRA published a Policy Statement and final new Supervisory Statement on Algorithmic Trading. The Supervisory Statement sets out the PRA's supervisory expectations of firms in relation to their algorithmic trading activities and covers: (i) governance; (ii) a firm's algorithmic approval process; (iii) testing and deployment; (iv) inventories and documentation; and (v) risk management and other systems and controls functions.

The Supervisory Statement applies to firms that engage in algorithmic trading and that are subject to the PRA's rules on algorithmic trading as well as the Regulatory Technical Standards on the organizational requirements of investment firms engaged in algorithmic trading (Commission Delegated Regulation (EU) 2017/589) under the Markets in Financial Instruments package. The Supervisory Statement applies to all of a firm's algorithmic trading activities, including those related to unregulated financial instruments.

Third-country firms operating in the U.K. through a branch should consider the PRA's policy on algorithmic trading. However, the PRA confirms that it will continue to follow the approach set out in the Supervisory Statement, "International banks: the Prudential Regulation Authority's approach to branch authorisation and supervision" (SS1/18).

The Policy Statement sets out the PRA's response to feedback received to the consultation proposals. As a result of the feedback, the PRA has made a few changes to the Supervisory Statement. Briefly, those changes are:

- Clarification that each function with a role in the approval of algorithms should sign off on the risks relevant to their role, not all of the risks.
- Clarification that firms are only expected to document material differences between the test and production environment, not all of the differences.
- Amending the expectation that inventories and documentation be 'immediately available' to only being 'available' to all personnel with responsibility for the oversight of the firm's algorithmic trading.

The PRA's expectations set out in the new Supervisory Statement will apply from June 30, 2018.

The PRA states that any remediation work that firms need to carry out after that date will be progressed through the PRA's usual supervisory activities.

The Policy Statement (PS12/18) is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/ps1218.pdf, the Supervisory Statement (SS5/18) is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2018/ss518.pdf and details of the PRA's consultation and the FCA's paper, "Algorithmic Trading Compliance in Wholesale Markets" are available at: https://finreg.shearman.com/uk-regulators-highlight-expectations-and-consult-.

Payment Services

European Banking Authority Clarifies Strong Customer Authentication Requirements for Account Servicing Payment Service Providers

On June 13, 2018, the European Banking Authority published an Opinion on the implementation of the Regulatory Technical Standards on strong customer authentication and common and secure communication. It has also published a consultation paper on draft Guidelines on the conditions that an account servicing payment service provider (ASPSP) must meet if it wants to provide access via a dedicated interface and be exempt from the obligation to have a fall-back option in place.

PSD2 requires that SCA is used for accessing a payment account online, initiating a payment transaction and carrying out a transaction through a remote channel. The RTS on SCA and CSC will apply directly across the EU partly from March 14, 2019 and predominantly from September 14, 2019.

To comply with PSD2 and the RTS, industry participants must develop or amend their systems and, where applicable, establish interfaces and other infrastructures. The Opinion is addressed to national regulators. Since the Opinion provides supervisory expectations, it will be of interest for payment services providers, payment schemes, technical service providers and industry initiatives. The Opinion contains general and specific comments, including on the scope of data and four-times daily limit and the application of and exemptions from SCA requirements.

The RTS on SCA and CSC regulate, among other things, the access by account information service providers and payment initiation service providers to customer payment account data held in ASPSPs. The RTS require, among other things, ASPSPs with payment accounts that are accessible online to offer at least one access interface ensuring secure communication with account information service providers, payment initiation service providers and payment service providers issuing card-based payment instruments. An ASPSP may choose between offering: (i) an interface that is dedicated to the communication with account information service providers, payment initiation service providers, and payment service providers issuing card-based payment instruments; or (ii) use of the interface for the identification and communication with the ASPSPs payment service users. Where a dedicated interface is elected, ASPSPs must establish a contingency mechanism to ensure that payment service providers who rely on the dedicated interface can continue to provide their services in the event that the dedicated interface suffers from unavailability or inadequate performance. ASPSPs may apply for exemption from having to provide such a mechanism, demonstrating that the dedicated interface complies with certain other specific conditions.

In the consultation paper, the EBA proposes guidelines to clarify the requirements that ASPSPs must meet to obtain an exemption, in particular, the service level, availability and performance of the interface, the publication of performance indicators, stress testing, obstacles to accessing payment accounts and resolution of problems. The draft Guidelines also clarify the information that national regulators should

consider when determining whether an ASPSP qualifies for the exemption. In addition to providing clarification, the EBA is aiming to ensure consistent application of the rules across the EU.

Responses to the consultation should be provided by August 13, 2018. The final Guidelines will then be finalized and will apply from January 1, 2019. Going forward, the EBA will continue to provide clarifications but will use the Single Rulebook Q&A to do so. The Q&A function will be extended to PSD2 by the end of June 2018.

The EBA's Opinion is available at: https://www.eba.europa.eu/documents/10180/2137845/Opinion+on+the+implementation+of+the+RTS+on+SCA+and+CSC+%28EBA-2018-Op-04%29.pdf/0f525dc7-0f97-4be7-9ad7-800723365b8e, the consultation paper and draft guidelines is available at: https://www.eba.europa.eu/documents/10180/2250578/CP+on+draft+Guidelines+on+the+conditions+to+be+met+to+benefit+from+an+exemption+from+contingency+measures+under+Article+33%286%29%20of+Regulation+%28EU%29%202018389+%28RTS+on+SCA+%26+CSC%29%20%28EBA-CP-2018-09%29.pdf, the feedback form is available at: http://bit.ly/2JDaGjl and the RTS on SCA and CSC is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0389&from=EN.

UK Payment Systems Regulator Publishes Discussion Paper on Use of Data in the Payments Industry

On June 12, 2018, the U.K. Payment Systems Regulator published a discussion paper seeking feedback on the use of data in the payments industry. The PSR is the regulator for designated payment systems in the U.K. These are currently BACS, CHAPS, Cheque & Credit, the Faster Payments Scheme, LINK, Northern Ireland Cheque Clearing, Mastercard and Visa Europe.

As the U.K. payments sector undergoes rapid evolution and the collection, analysis and use of payments data plays an increasingly important part in the payments industry, the PSR wants to gain an understanding of the role it might play in ensuring that new uses of data work well for businesses and individuals using payment systems. "Payments data" in this context includes a mix of financial, transactional, behavioural and other types of data, which payment service providers collect in the course of providing payment services to end-users.

The PSR has built on initial scoping work conducted in 2017, by carrying out additional research and analysis to understand the emerging trends and debates around payments data, including discussions with stakeholders in the industry and representatives from consumer organizations. The way that payments data is collected, used and shared can create opportunities for payment services providers and benefits for end-users. However, there may be barriers that prevent the realization of these opportunities. The discussion paper outlines three potential areas the PSR has identified where data use could directly affect its statutory objectives of promoting competition and innovation. These are:

- Reluctance of end-users to share payments data with third-party providers of other payments-related services (so-called "overlay services"), due to concerns over whether their data will be treated appropriately.
- Limitations on access to global datasets for potential providers of newer, more innovative payment services, including limited access to the global datasets that would provide valuable information for development of new industry anti-money laundering or anti-fraud measures.
- Potential barriers that could prevent customers and businesses getting the benefits from additional "enhanced" data attached to transactions. The benefits from enhanced data include cheaper and more efficient payments processing (leading to cheaper service provision to end-users).

The PSR has also identified several payments data-related issues that might affect its objectives indirectly, on which it will work jointly with other regulators where appropriate. These issues include the impact of high fixed costs on the collection, analysis and use of data and the potential for enhanced price differentiation.

The PSR seeks comments on discussion questions related to its assessment of the collection and classification of payments data, on the points in the value chain where data could be used to generate benefits for payment system participants, the different ways firms are currently using payments data and on the areas the PSR could develop policies or otherwise take action.

Comments are invited on the discussion paper by September 3, 2018.

The discussion paper is available at: https://www.psr.org.uk/sites/default/files/media/PDF/PSR-Discussion-paper-Data-in-the-payments-industry-June-2018.pdf.

Recovery & Resolution

Bank of England Confirms Approach to Valuation Capabilities of Firms to Support Resolvability

On June 13, 2018, following its consultation in August 2017, which closed in November 2017, the BoE published its Statement of Policy on its expectations on the minimum standard of valuation capabilities that firms should have in place to ensure that their valuations are sufficiently timely and robust to support the effective resolution of the firm. In the BoE's view, limitations to a firm's valuation capabilities may constitute an impediment to resolvability where those limitations would not reliably enable valuations that support the firm's intended resolution strategy.

The BoE has made several changes to its proposed Statement of Policy following consultation responses. Briefly, these are: (i) extending the compliance deadline to January 1, 2021 and introducing a provision for firm-specific compliance dates to be set in certain cases; (ii) explicitly requiring operational documentation of how capabilities would be used in a resolution scenario; and (iii) including a provision whereby certain smaller and simpler firms may not need to have resolution valuation models in place.

The Statement of Policy applies to all institutions from which the BoE expects to require resolution-specific valuations as a home or host resolution authority. This includes "MREL firms" that are notified by the BoE that their preferred resolution strategy involves the use of statutory stabilization powers in the U.K. and "Internal MREL firms" that are notified by the BoE that they are a material subsidiary of an overseas-based banking group for the purposes of setting internal MREL in the U.K. The Statement of Policy outlines the BoE's expectations on timeliness and robustness and sets out seven policy principles with which firms' valuation capabilities should comply. These relate to data and information, models, valuation methodologies, valuation assumptions, governance, documentation and assurance.

The BoE states that non-compliance with the Statement of Policy may constitute a barrier to resolvability and may result in the BoE directing firms to improve their valuation capabilities to ensure resolvability.

The consultation response and Statement of Policy are available at: https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/the-bank-of-englands-policy-on-valuation-capabilities-to-support-resolvability.pdf.

People

US Federal Reserve Board Nominations Approved by US Senate Banking Committee

On June 12, 2018, the U.S. Senate Committee on Banking, Housing, and Urban Affairs approved the nominations of the Honorable Richard Clarida to be a Member and Vice Chairman of the Federal Reserve Board and Ms. Michelle Bowman to be a Member of the Federal Reserve Board. The approved nominations will now advance to the full U.S. Senate for confirmation votes.

Further information regarding the nominations is available at: https://www.banking.senate.gov/legislative-calendar/nominations.

European Central Bank Confirms Appointment of Petra Senkovic as Director General

On June 15, 2018, the European Central Bank announced the appointment of Petra Senkovic as Director General, in the Directorate General Secretariat to the Supervisory Board, from July 1, 2018. Ms. Senkovic has been acting Director General since February 2018. The appointment follows the reorganization of the ECB's banking supervision division.

The announcement is available at: http://www.ecb.europa.eu/press/pr/date/2018/html/ecb.pr180615.en.html.

Upcoming Events

June 27, 2018: EBA public hearing on draft Guidelines on disclosure of non-performing and forborne exposures (registration closed June 5, 2018)

July 25, 2018: EBA public hearing on draft Guidelines on the conditions to be met to benefit from an exemption from contingency measures under the RTS on strong customer authentication and common and secure communication

September 4–5, 2018: OECD blockchain conference: Unleashing the potential and facing the challenges of blockchain (registration closes August 30, 2018)

October 15, 2018: SRB Conference 2018 - 10 years after the crisis: are banks now resolvable?

November 28, 2018: EBA 7th Annual Research Workshop - Reaping the benefits of an integrated EU banking market

Upcoming Consultation Deadlines

June 21, 2018: FCA consultation on its approach to supervision

June 21, 2018: FCA consultation on its approach to enforcement

June 21, 2018: European Commission consultation on a proposed Commission Delegated Regulation amending delegated legislation under MiFID II

June 21, 2018: European Commission consultation on a proposed Commission Delegated Regulation amending delegated legislation under the IDD

June 21, 2018: European Commission consultation on a Draft Delegated Regulation amending MiFID II secondary legislation, to promote SME Growth Markets

June 22, 2018: EBA consultation on RTS on the specification of the nature, severity and duration of an economic downturn

June 22, 2018: EBA consultation on estimation of loss given default appropriate for conditions of an economic downturn

June 25, 2018: U.S. Federal Reserve Board and OCC proposed amendments to supplementary leverage ratio calculations for G-SIBs and their insured depository institution subsidiaries

June 26, 2018: European Commission consultation on revisions to the Delegated Acts on the safe-keeping duties of Depositaries under AIFMD and the UCITS Directive

June 28, 2018: FCA consultation on revising the Financial Crime Guide to include insider dealing and market manipulation

July 4, 2018: FSB thematic peer review on bank resolution planning

July 5, 2018: FCA consultation on improving disclosure by AFMs to their investors (part of the Asset Management Market Study)

July 6, 2018: FSB consultation on proposed Recommendations for consistent national reporting of data on the use of compensation tools to address misconduct risk

July 9, 2018: FCA consultation on its approach to ex post impact evaluation

July 13, 2018: U.S. Federal Reserve Board, FDIC and OCC proposed amendments to regulatory capital rules to address changes to U.S. GAAP

July 17, 2018: EBA consultation on draft Guidelines on the exposures to be associated with high risk

July 18, 2018: BoE consultation on ISO 20022 migration for U.K. payment systems

July 20, 2018: EBA consultation on draft guidelines on STS criteria for ABCP securitization

July 20, 2018: EBA consultation on draft guidelines on STS criteria for non-ABCP securitization

July 24, 2018: European Commission proposal for a regulation on Sovereign Bond-Backed Securities

July 24, 2018: European Commission consultation on a proposed Regulation amending the Benchmarks Regulation.

July 25, 2018: European Commission consultation on a proposal for Regulation amending MAR and the PR to promote SME Growth Markets

July 27, 2018: EBA consultation on draft Guidelines on disclosure of non-performing and forborne exposures

August 13, 2018: EBA consultation on draft Guidelines on the conditions to be met to benefit from an exemption from contingency measures under the RTS on strong customer authentication and common and secure communication

August 20, 2018: FSB call for feedback on the technical implementation of the TLAC Standard

August 22, 2018: PRA consultation on Securitization: the new EU framework and significant risk transfer

September 3, 2018: PSR discussion paper on use of data in the payments industry

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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