

FINANCIAL REGULATORY DEVELOPMENTS FOCUS

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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Our latest quarterly Governance & Securities Update for Corporates is available [here](#).

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AML/CTF, Insider Trading and Sanctions

UK Serious Fraud Office Charges Former Banker With Conspiracy to Defraud for Manipulation of Euro Interbank Offered Rate

On October 21, 2018, the U.K. Serious Fraud Office charged a former banker with conspiracy to defraud, as part of its investigation into the manipulation of the Euro Interbank Offered Rate.

The former banker was arrested in Italy in August 2018 after his trip to the country activated a European Arrest Warrant that had been secured by the SFO in 2016. Italian authorities ruled on October 12, 2018 that he should be extradited to the U.K. and he was charged with conspiracy to defraud at Westminster Magistrates' Court on October 20, 2018.

The next hearing was scheduled to take place at Southwark Crown Court on October 24, 2018.

The SFO's announcement is available at: <https://www.sfo.gov.uk/2018/10/21/sfo-charges-andreas-hauschild-with-euribor-manipulation>

Financial Action Task Force Publishes Final Guidance on a Risk-Based Approach for the Securities Sector

On October 25, 2018, the Financial Action Task Force published the finalized version of its Guidance on a Risk-Based Approach for the Securities Sector. The finalized Guidance was adopted at the FATF's plenary meeting held on October 17–19, 2018. The FATF has developed the Guidance in conjunction with the private sector, to assist governments, regulators, Financial Intelligence Units and participants in the securities sector to adopt a risk-based approach to anti-money laundering and countering the financing of terrorism.

The final Guidance sets out the key principles involved in applying a risk-based approach to AML and CTF. Separate sections provide specific guidance to securities providers and intermediaries and to securities supervisors on the effective implementation of a risk-based approach. Annexes provide examples of supervisory practices that have been adopted and examples of suspicious activity indicators relevant to securities.

The Guidance is non-binding. It should be read in conjunction with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation and the 2009 Report on Money Laundering and Terrorist Financing.

The consultation on draft Guidance is available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/RBA-Securities-Sector.pdf>.

Bank Prudential Regulation & Regulatory Capital

EU Supervisory Authorities Propose Revisions to Implementing Technical Standards for Mapping of External Credit Ratings

On October 26, 2018, the Joint Committee of the European Securities Authorities (that is, the EBA, ESMA and EIOPA) published a consultation paper setting out proposed revisions to Implementing Technical Standards on the mapping of External Credit Assessment Institutions' credit assessments under the Capital Requirements Regulation.

The proposed revisions will amend the existing Implementing Regulation ((EU) 2016/1799), which sets out how ECAIs' credit assessments should be "mapped" to credit quality steps for the purposes of calculating capital requirements. The proposed amendments reflect the result of a monitoring exercise on the adequacy of mappings, which necessitates amendments related to: (i) the re-allocation of the credit quality steps for two

ECAIs; and (ii) changes in credit rating scales/types for ten ECAIs. The consultation webpage also contains mapping reports for each of the 11 ECAIs concerned.

Comments on the consultation are invited by December 31, 2018. Respondents are asked to provide comments via the “Send your comments” button on the EBA’s consultation webpage.

The consultation paper and supporting documents are available at: https://www.eba.europa.eu/news-press/calendar?p_p_id=8&_8_struts_action=%2Fcalendar%2Fview_event&_8_eventId=2416230.

European Banking Authority Sets Out Its Work Priorities for 2019

On October 23, 2018, the EBA published its Work Programme for 2019, setting out details of, and planned main outputs from, 37 separate work streams across the following five key strategic priorities:

- I. Leading the Basel III implementation in the EU.
- II. Understanding risks and opportunities arising from financial innovation.
- III. Collecting, disseminating and analyzing banking data.
- IV. Ensuring a smooth relocation of the EBA to Paris.
- V. Fostering the increase of the loss-absorbing capacity of the EU banking system.

The EBA also confirms that work related to Brexit will remain a horizontal priority for the EBA in 2019 and explains that the EBA’s other activities may be affected in the future by Brexit-related developments. Should that be the case, any substantial change in the Work Programme will be communicated in due time, in order to seek steering and approval from its Management Board and Board of Supervisors.

The EBA’s 2019 Work Programme is available at:

<http://www.eba.europa.eu/documents/10180/2410831/EBA+2019+Work+Programme.pdf>.

Bank Structural Reform

UK Ring-Fencing Regime to Remain Unchanged in a ‘No Deal’ Brexit Scenario

On October 22, 2018, HM Treasury published explanatory guidance on potential changes to the U.K.’s laws on ring-fencing in preparation for a “no deal” scenario in which the U.K. leaves the EU on March 29, 2019. The draft Ring-Fenced Bodies (Amendment) (EU Exit) Regulations 2018 have not yet been published. HM Treasury intends to publish the draft Regulations in due course and to lay them before Parliament before exit day.

From January 1, 2019, the U.K. ring-fencing laws will require U.K. banks and banking groups that hold more than £25 billion in core deposits to separate their core retail banking business from their investment banking business. Restrictions will limit the products that a ring-fenced bank can offer and where it can conduct business. In particular, a ring-fenced bank will not be able to own a banking subsidiary or branch that is established outside of the EEA. The U.K. legislation defines the activities that a ring-fenced bank may or may not undertake by reference to definitions in EU legislation.

HM Treasury is proposing to continue to allow ring-fenced banks to own an EEA bank subsidiary or branch to minimize the disruption to U.K. banks as a result of Brexit. In addition, the draft Regulations will amend the definitions used in the U.K. legislation to ensure that the ring-fencing regime continues to operate as it should when the U.K. leaves the EU.

The explanatory guidance notes that a statutory review of the ring-fencing regime is due in 2020-2021 and states that this may be an appropriate juncture at which to assess the ring-fencing regime.

The full text of the explanatory guidance is available at: <https://www.gov.uk/government/publications/draft-ring-fenced-bodies-amendment-eu-exit-regulations-2018/ring-fenced-bodies-amendment-eu-exit-regulations-2018-explanatory-information>.

Brexit for Financial Services

UK Legislation in Force Empowering Regulators to Amend EU Binding Technical Standards for Brexit

The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 were made on October 25, 2018 and entered into force on October 26, 2018.

The Regulations delegate power under the EU (Withdrawal) Act 2018 to the Bank of England, the Prudential Regulation Authority, the Financial Conduct Authority and the Payment Systems Regulator to fix deficiencies in EU Binding Technical Standards and regulators' rules in advance of exit day, so that the BTS and regulators' rules function effectively after Brexit. The Regulations also establish the statutory basis on which those regulators will continue to maintain the relevant BTS after exit. The Schedule to the Regulations lists all the BTS that will be "onshored" and, for each, allocates joint or individual responsibility among the regulators.

The version of the Regulations that has entered into force contains only minor changes from the draft version that was published in July 2018.

The Regulations (S.I. 2018/1115) are available at http://www.legislation.gov.uk/ukxi/2018/1115/pdfs/ukxi_20181115_en.pdf and the accompanying explanatory memorandum is available at: http://www.legislation.gov.uk/ukxi/2018/1115/pdfs/ukxiem_20181115_en.pdf.

Bank of England Launches Consultation Package on EU Withdrawal

On October 25, 2018, the BoE issued a press release providing an update on its regulatory and supervisory approach to Brexit. The press release refers to a package of communications and new consultations published by the BoE on October 25, 2018. Building on previous communications with firms, this package of communications includes four consultation papers:

- I. A joint consultation on the BoE/Prudential Regulation Authority's general approach to making changes to PRA rules and to Binding Technical Standards to implement Brexit. This consultation is to be read in conjunction with the other three consultations.
- II. A PRA consultation on proposed changes to PRA rules and to the onshored BTS within the PRA's remit.
- III. A BoE consultation on changes to Financial Market Infrastructure rules and onshored BTS within the BoE's remit as FMI supervisor, along with a draft Supervisory Statement on the BoE's expectations of FMIs in relation to existing non-binding domestic material.
- IV. A BoE consultation on the onshored BTS within the BoE's remit as the U.K. resolution authority.

Further guidance is also given on the process for authorization and recognition for incoming EEA firms and non-U.K. Financial Market Infrastructures. The PRA has sent a "Dear CEO" letter to impacted firms and the BoE has created a website page on the proposed operation of the Temporary Permissions Regime for incoming EEA firms, setting out details on entry and exit from the TPR, the process firms should follow for notifying the PRA of their intention to make use of the regime, applicable rules during the regime and transitional relief for some rules.

Further details on the temporary recognition regime for non-U.K. CCPs and the transitional process for non-U.K. CSDs are set out in new "Dear CEO" letters that were sent to non-U.K. CCPs and non-U.K. CSDs and supplement the previous such communications issued by the BoE earlier this year.

Firms and FMI are asked to read the published materials and to continue to engage with their BoE and PRA contacts on their ongoing planning for Brexit. The materials are particularly relevant for:

- all firms authorized and regulated by the PRA;
- EEA firms undertaking cross-border activities into the U.K. from the rest of the EU;
- U.K. FMIs regulated by the BoE; and
- non-U.K. CCPs and non-U.K. Central Securities Depositories providing cross-border services into the U.K.

The proposed changes will only take effect on exit day in a “no-deal” scenario, in which the U.K. exits the EU on March 29, 2019 without a transitional period agreed between the U.K. and the EU as part of a Withdrawal Agreement. If there is a transitional period, the BoE expects that the changes would take effect at the end of that period.

The press release also states that the BoE has restructured its website to create a dedicated “EU Withdrawal” webpage, which provides access to all information on post-Brexit authorization, recognition and temporary permissions as well as all key communications issued by the BoE.

The BoE’s press release is available at: <https://www.bankofengland.co.uk/-/media/boe/files/news/2018/october/boes-approach-to-financial-services-legislation-under-the-eu-withdrawal-act-october-2018.pdf> and the BoE’s EU Withdrawal webpage is available at: <https://www.bankofengland.co.uk/eu-withdrawal>.

‘Dear CEO’ Letter From UK Prudential Regulator Updates PRA-Regulated Firms on Brexit

On October 25, 2018 the U.K. PRA published a “Dear CEO” letter that it has sent to the Chief Executive Officers of all firms authorized and regulated by the PRA, as well as EEA firms undertaking cross-border activities into the U.K. from the rest of the European Union by means of a single market passport.

The letter refers to the publication, on October 25, 2018, of a package of consultations and other communications by the Bank of England that provide more detail on the planned Brexit-related changes to PRA rules and to the onshored Binding Technical Standards within the remit of the PRA and the BOE in their various capacities. The letter builds on the communications released by the government and U.K. regulators in June 2018 on their overall approach to onshoring financial services legislation under the EU (Withdrawal) Act 2018.

The PRA stresses that its position remains that, in all but a few areas, U.K.-regulated firms do not need to take action now to implement, before exit day, Brexit-related changes in U.K. law. Certain limited exceptions to this are set out in the package of communications. The PRA explains that planned changes to U.K. law will take effect at the end of any transitional, or “implementation,” period agreed under the U.K.-EU Withdrawal Agreement. In a “no-deal” scenario in which the U.K. exits the EU on March 29, 2019 without a ratified Withdrawal Agreement, and consequently no transitional period, the Brexit-related changes in U.K. law would take effect on exit day. However, the practical implications for firms would be mitigated by the fact that the government proposes to empower the U.K. regulators to grant transitional relief to ensure that firms have sufficient time to comply with the changes.

The letter provides an update on the Parliamentary scrutiny of the secondary legislation that will establish the Temporary Permissions Regime that would come into operation in the event of a “no deal” scenario. The TPR will enable EEA firms undertaking cross-border activities into the U.K. via a single market passport to continue to operate in the U.K. for a limited period after exit, to provide them time to seek PRA authorization. The letter invites affected firms to review the package of communications including BoE guidance setting out

further information on: (i) entry and exit from the regime; (ii) the process firms should follow for notifying the PRA of their intention to make use of the TPR; (iii) applicable rules during the regime; and (iv) transitional relief for some rules.

The Financial Conduct Authority has also recently consulted separately on the TPR as it applies to FCA-regulated firms and investment funds.

The “Dear CEO” letter is available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2018/update-to-firms-on-the-boes-regulatory-approach-and-firm-preparations-for-eu-withdrawal.pdf>.

Bank of England Updates Non-UK CCPs on Approach to Recognition Post-Brexit

On October 25, 2018, the BoE published a “Dear CEO” letter sent by Sir John Cunliffe, Deputy Governor, Financial Stability, to the Chief Executive Officers of non-U.K. CCPs to provide more detail on the post-Brexit recognition of non-U.K. CCPs and the temporary permissions regime that will give temporary deemed recognized status to eligible non-U.K. CCPs.

The BoE wrote to the CEOs of non-U.K. CCPs in December 2017, outlining that forthcoming U.K. legislation would give it a new power to recognize non-U.K. CCPs and that it anticipated that, in the period immediately after Brexit, the recognition regime for non-U.K. CCPs would be materially the same as the third country recognition regime under the European Market Infrastructure Regulation, but might be reviewed later. In an update in March 2018, the BoE confirmed that non-U.K. CCPs already providing services in the U.K. should be able to continue to do so until the end of the envisaged transitional, or “implementation” period after Brexit.

This latest letter to non-U.K. CCPs provides an update following the laying before Parliament, in July 2018, of the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018. Subject to Parliamentary scrutiny, these Regulations are expected to enter into force during Q4 2018, establishing the post-Brexit framework for non-U.K. CCP recognition. The letter outlines actions non-U.K. CCPs will need to take once the Regulations are in force.

The Regulations will empower the BoE to receive applications for recognition (both prior to and after Brexit) and to assess and make decisions on recognition that will take effect after Brexit. The Dear CEO letter sets out, in an Annex, a list of the information that should be included in an application for recognition by a non-U.K. CCP. This is materially the same as the information needed for the third country recognition application process under EMIR. An application fee of £35,000 has been proposed in a separately published consultation.

Recognition of a non-U.K. CCP is contingent on several factors:

- a determination must have been made by HM Treasury that the legal and supervisory arrangements of the non-U.K. CCP’s home regime are equivalent to the U.K. regime;
- there must be effective supervision and enforcement of CCPs in the non-U.K. CCP’s home jurisdiction;
- cooperation arrangements must be in place between the relevant authorities; and
- the CCP must not be established in a jurisdiction classified as high risk in the U.K. anti-money laundering and counter-terrorist financing framework.

The Regulations will also establish a Temporary Recognition Regime for non-U.K. CCPs, allowing eligible non-U.K. CCPs to be deemed to be recognized and to continue to provide clearing services in the U.K. for a period of up to three years after Brexit. Non-U.K. CCPs deemed to be recognized under the regime will be

listed on the BoE's website. The duration of the TRR is extendable by 12-month increments under certain circumstances by HM Treasury. Eligibility criteria are set out in the Annex to the Dear CEO letter. Non-U.K. CCPs wishing to enter the TRR must, before Brexit, either notify the BoE or submit an application for recognition and provide certain information. They must also submit their application for actual recognition on a time frame agreed with the BoE. The BoE will make further information available on the notification procedure after the Regulations come into force.

The BoE invites non-U.K. CCPs to approach it if they require further guidance.

The "Dear CEO" letter is available at: <https://www.bankofengland.co.uk/-/media/boe/files/letter/2018/update-to-ccps.pdf>.

Bank of England Updates Non-UK CSDs on Approach to Recognition Post-Brexit

On October 25, 2018, the BoE published a "Dear CEO" letter sent by Sir John Cunliffe, Deputy Governor, Financial Stability, to the Chief Executive Officers of non-U.K. Central Securities Depositories that have been identified as possibly requiring recognition to provide CSD services in the U.K. after Brexit. The Dear CEO letter provides more detail on the post-Brexit recognition of non-U.K. CSDs by the BoE and on the transitional regime that has been set out in the draft Central Securities Depositories (Amendment) (EU Exit) Regulations 2018.

The draft Regulations will operate to "onshore" the EU Central Securities Depositories Regulation. The BoE will be empowered to receive applications for recognition (both prior to and after Brexit) and to assess and make decisions on recognition that will take effect after Brexit. The Dear CEO letter explains that, immediately after Brexit, the U.K.'s domestic recognition regime for non-U.K. CSDs will, in essence, be the same as the regime for third country recognition under the CSDR and that the BoE will review the framework in due course.

The U.K. transitional regime introduced by the draft Regulations is similar to the CSDR's transitional regime for third country CSDs that are awaiting recognition. The U.K. regime will, subject to a notification requirement, enable non-U.K. CSDs providing CSD services in the U.K. prior to Brexit to use the transitional regime to continue to provide services in the U.K. for a limited period while awaiting the completion of the recognition process. CSDs that are eligible for the transitional regime are: (i) non-U.K. CSDs that are within the current third country transitional regime under CSDR; and (ii) EU CSDs that are authorized in the EU under the CSDR prior to Brexit. The BoE invites non-U.K. CSDs to reply to the Dear CEO letter to indicate that they intend to use the transitional regime. The reply should include information specified in the Dear CEO letter. The BoE will treat this as the required notification once the draft Regulations are in force.

Non-U.K. CSDs can use the transitional regime until the recognition process is complete. They must, however, make an application for recognition within six months of an equivalence decision having been made.

The "Dear CEO" letter is available at: <https://www.bankofengland.co.uk/-/media/boe/files/letter/2018/letter-to-csds.pdf>.

Bank of England and UK Prudential Regulator Consult on Approach to Onshoring EU Financial Services Legislation for Brexit

On October 25, 2018, the BoE and the U.K. PRA launched a joint consultation paper entitled "The Bank of England's approach to amending financial services legislation under the European Union (Withdrawal) Act 2018." The consultation forms part of a package of consultations, "Dear CEO" letters and other communications published by the BoE and the PRA on October 25, 2018. The consultation covers:

- I. How the BoE and the PRA propose to use their delegated power, under the Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018, to address deficiencies in the PRA Rulebook and to make any necessary amendments to the Binding Technical Standards which comprise "level 2" of the EU financial services legislation that will be onshored.
- II. How the BoE and PRA propose to use the new "temporary transitional power" to grant temporary transitional relief where requirements have been introduced or have changed as a result of onshoring. HM Treasury proposes to legislate to grant the regulators this power, for use in the event of a "no deal" scenario, and set out further details of its approach on October 8, 2018.
- III. How the BoE and PRA propose to treat the existing body "level 3" Guidelines and Recommendations on Brexit.

This consultation on the BoE's and PRA's general approach provides background for, and should be read in conjunction with, the other consultation papers that form part of the package of consultations and communications on Brexit preparations. The proposals in the consultation paper are relevant to:

- all firms authorized and regulated by the PRA;
- EEA firms undertaking cross-border activities into the U.K. from the rest of the EU;
- U.K. FMI's regulated by the BoE; and
- non-U.K. CCPs and non-U.K. Central Securities Depositories providing cross-border services into the U.K.

Some notable elements of the consultation are highlighted below.

Temporary transitional power

The temporary transitional power to be introduced by HM Treasury will be available to be used by regulators in respect of any onshoring changes that affect firms' and FMI's obligations. Relief will be able to be granted for up to two years after exit day. In the consultation paper, the BoE and PRA confirm that they propose to use the power broadly and provide the following five examples demonstrating how they intend to use the power to delay the application of onshoring changes that would otherwise require firms and FMI's to take action before exit day to comply with the changes:

- I. Firms and FMI's that are subject to U.K. laws would be able to continue to treat EU27 exposures and assets preferentially for the purposes of capital requirements, liquidity and large exposures regimes.
- II. Reporting and disclosure of regulatory data would be on the same basis as before exit day.
- III. U.K. groups that are part of EEA-headquartered banking groups would not need to comply with consolidated liquidity requirements at U.K. level.
- IV. Where Brexit results in new U.K. sub-groups, if HM Treasury relieves the PRA of its obligation to exercise group supervision at the level of the U.K. sub-group, then EEA-headquartered insurance groups would not need to calculate or report consolidated capital requirements at the U.K. sub-group level.
- V. Credit unions would be able to continue to place deposits with EEA credit institutions.

The PRA has so far identified three areas where it would not propose to exercise the temporary transitional power, on the basis that to do so may undermine its statutory objectives. The areas are: (i) contractual recognition of bail-in rules; (ii) contractual agreement to resolution stays on termination provisions; and (iii) Financial Services Compensation Scheme protection.

Treatment of Level 3 materials

The BoE and the PRA have prepared a draft Statement of Policy on future compliance with the body of "Level 3" Guidelines and Recommendations that have been prepared by the European Supervisory Authorities. The draft Statement of Policy includes a non-exhaustive list of Guidelines that are currently complied with in the U.K. The BoE and PRA do not propose to reproduce or amend the content of existing Guidelines and Recommendations before exit day. The BoE and PRA expect firms and FMI's to continue to comply after exit

day with Guidelines that are currently complied with and should interpret them in light of Brexit, onshoring changes and any transitional relief.

If new Guidelines and Recommendations are made by EU authorities, or changes are made to existing material, these will not automatically apply on Brexit. The BoE and PRA will consider their approach and may issue further statements in such cases.

Comments on the consultation are invited by January 2, 2019. The proposed changes will only take effect on exit day in a “no-deal” scenario, in which the U.K. exits the EU on March 29, 2019 without a transitional period agreed between the U.K. and the EU as part of a Withdrawal Agreement. If there is a transitional period, it is expected that the changes would take effect at the end of that period.

The joint BoE/PRA consultation paper is available at: <https://www.bankofengland.co.uk/-/media/boe/files/paper/2018/cp2518.pdf>.

UK Prudential Regulator Consults on Rule Changes and Onshoring of Binding Technical Standards for Brexit

On October 25, 2018, the U.K. PRA published a consultation paper entitled “UK withdrawal from the EU: Changes to PRA Rulebook and onshored Binding Technical Standards.” The consultation forms part of a package of consultations, “Dear CEO” letters and other communications published by the BoE and the PRA on October 25, 2018.

The consultation paper sets out a suite of proposed amendments by the PRA to ensure an operable legal and regulatory framework after the U.K. leaves the EU. It includes:

- the PRA’s proposals to fix deficiencies arising from the U.K.’s withdrawal from the EU in the PRA Rulebook;
- the PRA’s proposals to fix deficiencies in the Binding Technical Standards within the PRA’s remit that will be converted, or “onshored,” into U.K. law.
- the PRA’s proposals on how existing non-binding PRA materials, including Supervisory Statements, Statements of Policy and the PRA Approach Documents should be read by firms after Brexit.

The PRA’s proposals are based on the onshoring legislation either published in draft by HM Treasury or laid before Parliament as at the date of publication of the consultation. The PRA will propose further changes to the PRA Rulebook and onshored BTS when further onshoring legislation is published.

The proposals in the consultation paper are relevant to:

- all firms authorized and regulated by the PRA;
- EEA firms undertaking cross-border activities into the U.K. from the rest of the EU that are expected to have deemed permission under the temporary permissions regime; and
- Firms (including EEA firms) that are expected to apply for PRA authorization in the future.

Some notable elements of the consultation are highlighted below.

PRA Rule changes

The majority of proposed changes to PRA rules relevant to banks, building societies and designated investment firms arise as a result of changes that will be made under the onshoring legislation that is either in draft form or that has been laid before Parliament to amend deficiencies in the Capital Requirements Regulation and the Bank Recovery and Resolution Directive. Some firms will also be affected by onshoring legislation (and consequent PRA rule changes) for the European Market Infrastructure Regulation or the

Central Securities Depositories Regulation. Recently-published HM Treasury policy notes on ring-fencing and on the Financial Conglomerates Directive will also be relevant.

Most of these changes follow the general approach set out in the separately published BoE/PRA consultation paper on onshoring EU legislation, which assumes a baseline approach that EEA states would be treated as “third country” states by the U.K. and the EU would also treat the U.K. as a “third country.” The consultation paper highlights some exceptions to this baseline approach:

- **Contractual Recognition of Bail-In:** PRA-regulated banks and some large investment firms are required to agree with their counterparties that such counterparties would recognize bail-in under the BRRD, where the governing law is not an EU governing law. After Brexit, this requirement will apply to non-U.K. law-governed agreements of in-scope firms. To avoid the potential costs for firms of renegotiating existing EEA law-governed liabilities to include terms for the contractual recognition of bail-in term, unless they are materially amended after exit day, the PRA proposes to amend Rule 2.1 of the Contractual Recognition of Bail-In Part of the PRA Rulebook, so that the requirement does not apply in respect of EEA law-governed liabilities that were created before exit day. As a result, bail-in clauses for EEA (non-U.K.) law-governed agreements will only need inserting for new agreements or amendments to existing agreements.
- **Stay in Resolution:** Similar rules require counterparties to in-scope firms to agree contractually to stays on termination rights applicable in a resolution. Currently, such clauses are mandatory in non-EU law-governed agreements. In-scope firms will need in future to include such clauses in non-U.K. law-governed agreements. The PRA proposes not to amend its existing Stay in Resolution rules, meaning that the existing stock of financial arrangements governed by EEA law as at exit day would not need to be updated. Firms would be required to comply to agree such provisions in respect of new EEA (non-U.K.) law-governed contracts that are entered into or amended after exit day.
- **Use of temporary transitional power:** The PRA confirms that it does not propose to use its temporary transitional power to provide transitional relief for regulatory obligations that relate either to contractual recognition of bail-in or to stay in resolution.

Temporary Permissions Regime

The PRA has confirmed that EEA firms operating in the U.K. under a single market passport that enter the TPR will be treated as third country firms. The PRA expects that firms in the TPR with a branch in the U.K. will comply with the same rules that apply to other third country firms’ U.K. branches. For cross-border service providers in the TPR with no U.K. branch, a more limited set of rules will apply.

The PRA proposes to apply the Senior Managers and Certification Regime rules for U.K. branches of third country firms (third country branches) to firms in the TPR including, with appropriate modifications, to cross-border service providers without a U.K. branch.

Binding Technical Standards

The PRA is consulting on changes to onshored BTS that will be the responsibility of the PRA under the draft Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018. These Regulations give the PRA and the Financial Conduct Authority the option either to retain BTS for which they are jointly responsible as “joint,” or to “divide” them, resulting in a PRA version of the onshored BTS for PRA-regulated firms and an FCA version for FCA-regulated firms. The FCA and PRA have opted to “divide” all joint BTS, with the exception of one BTS under the European Market Infrastructure Regulation. Where BTS have been “divided,” to avoid duplicative consultations, one regulator will consult on those BTS and each regulator will then make an identical set of amendments to their part of the relevant BTS.

The consultation sets out the proposed changes to the joint PRA/FCA BTS under the Bank Recovery and Resolution Directive, the Capital Requirements Directive, the Capital Requirements Regulation and the Financial Conglomerates Directive. The FCA has consulted separately on the joint PRA/FCA BTS under the Markets in Financial Instruments package. The FCA consultation closes on December 7, 2018. PRA-regulated firms can feed back to the PRA on the MiFID II BTS proposals if they wish.

The consultation also sets out in an appendix a full list of the joint BTS for which responsibilities among regulators have been divided, the BTS for which the PRA has responsibility, along with draft “EU Exit Instruments” to effect the changes to those BTS. Some existing BTS will be deleted on Brexit, for example if they relate solely to relationships between EU bodies and cease to be relevant for U.K. purposes after Brexit.

Depositor and Dormant Account Protection

The consultation includes a draft update to the PRA’s Supervisory Statement 18/15, “Depositor and dormant account protection.”

Non-Binding PRA Materials

Except for proposed changes to its Supervisory Statement, “Depositor and dormant account protection,” the PRA does not propose to make line-by-line amendments to its non-binding materials at this stage to reflect the U.K.’s withdrawal from the EU.

The consultation includes a draft Supervisory Statement, “Non-binding PRA materials: the Prudential Regulation Authority’s approach after exit from the EU,” setting out how firms should interpret existing non-binding PRA regulatory and supervisory materials after Brexit. This covers all PRA Approach Documents, all Supervisory Statements and Statements of Policy and all other guidance in force at exit day, including any legacy Financial Services Authority guidance that was adopted by the PRA. The draft Supervisory Statement includes a non-exhaustive list of various key changes being made to onshored legislation that firms should consider when interpreting existing PRA non-binding materials.

Reporting and Disclosure Requirements

The consultation includes a draft Supervisory Statement, entitled “PRA approach to interpreting reporting and disclosure requirements after the U.K.’s withdrawal from the EU,” which sets out how the PRA expects firms to interpret EU references in reporting and disclosure requirements after exit day.

The PRA has not made line-by-line changes to reporting or disclosure requirements as a result of Brexit. The Supervisory Statement sets out a general approach to the interpretation of EU references, along with further specific requirements relating to the reporting and disclosure requirements under the Capital Requirements Regulation, Solvency II and certain specific EU-based references in reporting and disclosure requirements set out in PRA rules.

Comments on the consultation are invited by January 2, 2019. The proposed changes will only take effect on exit day in a “no-deal” scenario, in which the U.K. exits the EU on March 29, 2019 without a transitional period agreed between the U.K. and the EU as part of a Withdrawal Agreement. If there is a transitional period, it is expected that the changes would take effect at the end of that period.

The PRA’s consultation paper and related appendices are available at:

<https://www.bankofengland.co.uk/prudential-regulation/publication/2018/uk-withdrawal-from-the-eu-changes-to-pra-rulebook-and-onshored-bts>.

Bank of England Consults on Changes to FMI Rules and Onshored Binding Technical Standards for Brexit

On October 25, 2018, the BoE published a consultation paper entitled “UK withdrawal from the EU: Changes to FMI rules and onshored Binding Technical Standards.” The consultation forms part of a package of consultations, “Dear CEO” letters and other communications published by the BoE and the PRA on October 25, 2018.

The consultation proposals cover:

- the BoE’s proposed fixes to deficiencies in the onshored Binding Technical Standards for which the BoE, as FMI supervisor, has responsibility under the Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018;
- the BoE’s proposals to amend its FMI rules; and
- the BoE’s proposed approach to non-binding BoE materials after Brexit.

The proposals in the consultation paper are relevant to the U.K. Financial Market Infrastructures (CCPs, central securities depositories and payment systems) regulated by the BoE, as well as market infrastructures and market participants more generally.

Notable elements of the consultation are highlighted below.

Binding Technical Standards

The Financial Regulators’ Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 gives the BoE responsibility, in its capacity as FMI competent authority, for correcting deficiencies in certain onshored Binding Technical Standards under the European Market Infrastructure Regulation and the Central Securities Depositories Regulation. The BoE notes that a number of BTS within the BoE’s remit relating to EMIR and CSDR will need to be deleted since they become irrelevant or redundant in a U.K. context. The BoE’s proposed changes to the remaining BTS largely follow the general approach set out in a separately published joint BoE/PRA consultation. This consultation highlights the areas where the BoE diverges from the general approach. These relate to:

- EMIR Intragroup exemptions;
- references to European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM);
- geographical scope of CSDs contained in application information concerning groups; and
- covered bonds.

FMI Rule Amendments

The BoE will need to amend two of the Recognised Clearing House Rules that contain references to EU legislation. The Recognised Clearing House Rules are legal instruments made by the BoE and made available on the BoE’s website. A draft EU Exit Instrument effecting the changes is included in the consultation.

Non-Binding BoE Materials

The consultation includes a draft Supervisory Statement entitled “Non-binding Bank materials relating to Financial Market Infrastructure Supervision: The Bank’s approach after the U.K.’s withdrawal from the EU,” detailing how firms should interpret non-binding material after exit day. This includes Approach Documents, Policy statements, statutory statements of policy and procedure, guidance on the BoE’s implementation of FMI-related EU requirements and other relevant material on the BoE’s financial market infrastructure supervision website.

The BoE does not propose to make detailed amendments to these materials ahead of Brexit. The Supervisory Statement contains guidance on how such materials should be interpreted in the context of changes made to related legislation, the proposed amendments to FMI rules and the BoE's proposed amendments to BTS.

Comments on the consultation are invited by January 2, 2019. The proposed changes will only take effect on exit day in a "no-deal" scenario, in which the U.K. exits the EU on March 29, 2019 without a transitional period agreed between the U.K. and the EU as part of a Withdrawal Agreement. If there is a transitional period, it is expected that the changes would take effect at the end of that period.

The BoE's consultation paper and related appendices are available at:

<https://www.bankofengland.co.uk/paper/2018/uk-withdrawal-from-the-eu-changes-to-fmi-rules-and-onshored-binding-technical-standards>.

Bank of England Consults on Approach to Resolution Statements of Policy and Onshored Binding Technical Standards for Brexit

On October 25, 2018, the BoE published a consultation paper entitled "UK withdrawal from the EU: The Bank of England's approach to resolution statements of policy and onshored Binding Technical Standards." The consultation forms part of a package of consultations, "Dear CEO" letters and other communications published by the BoE and the Prudential Regulation Authority on October 25, 2018.

The consultation covers:

- the BoE's proposals to fix deficiencies in the onshored Binding Technical Standards under the Bank Recovery and Resolution Directive, for which it is responsible in its capacity as U.K. resolution authority. The PRA has consulted separately on proposals for the BRRD BTS that are within its remit; and
- the BoE's proposed guidance on how the existing Statements of Policy on resolution should be interpreted after Brexit. These SoPs cover the BoE's: (i) power to direct institutions to address impediments to resolvability; (ii) approach to setting a minimum requirement for own funds and eligible liabilities (MREL) within groups, and further issues; and (iii) policy on valuation capabilities to support resolvability.

The proposals are relevant to all firms that are subject to the BoE's resolution powers, such as banks, larger investment firms and CCPs.

Comments on the consultation are invited by January 2, 2019. The proposed changes will only take effect on exit day in a "no-deal" scenario, in which the U.K. exits the EU on March 29, 2019 without a transitional period agreed between the U.K. and the EU as part of a Withdrawal Agreement. If there is a transitional period, it is expected that the changes would take effect at the end of that period.

The BoE's consultation paper and related appendix are available at:

<https://www.bankofengland.co.uk/paper/2018/uk-withdrawal-from-the-eu-boes-approach-to-resolution-sop-and-onshored-binding-technical-standards>.

UK Draft Legislation to Onshore the European Market Infrastructure Regulation Published

On October 22, 2018, HM Treasury published in draft format the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018—the U.K.'s draft statutory instrument that would implement a post-Brexit EMIR regime, together with explanatory guidance. The draft EMIR Regulations will affect CCPs, clearing members, their clients, Trade Repositories, TR users and U.K. persons entering into derivatives contracts. They will also, like EMIR, have

impacts for persons around the world which enter into derivatives with U.K. persons through U.K. clearing members or that are ultimately held with CCPs that are regulated or recognized in the U.K.

The draft EMIR Regulations have been prepared to ensure that there continues to be an effective regulatory framework for OTC derivatives, CCPs and TRs in the U.K. after exit day. Onshoring of EMIR has been dealt with in three separate pieces of legislation. The draft EMIR Regulations should be read in conjunction with the Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018, which were published in draft form on July 24, 2018 and October 5, 2018 respectively.

The draft EMIR Regulations make a number of amendments to fix deficiencies in the onshored version EMIR.

- I. **Transfer of functions:** provisions in the draft EMIR Regulations ensure that EMIR requirements will continue to apply in the U.K., transferring responsibilities to the Bank of England, Prudential Regulation Authority and/or Financial Conduct Authority as appropriate.
- II. **Regulation of CCPs:** authorization or recognition of CCPs will be the responsibility of the BoE after exit (this is dealt with in the CCP regulations).
- III. **Clearing Obligation:** The power to set the clearing obligation for different types of asset classes will be transferred from the European Securities and Markets Authority to the BoE. The BoE will also be empowered to specify the timing for any phase-in of any new clearing obligations to apply to PRA-regulated entities (the FCA will be similarly empowered in relation to FCA-regulated entities).
- IV. **Reporting Obligation:** registration or recognition of Trade Repositories will be the responsibility of the FCA after exit (as set forth in the separate Trade Repositories regulations). The draft EMIR Regulations empower the FCA to suspend the reporting obligation for a period of up to one year, with the agreement of HM Treasury, if there is no registered or recognized TR available. The BoE will be responsible for further specifying reporting requirements for CCPs and the FCA will be responsible for such standards as they apply to all other firms.
- V. **Margin Obligations:** EMIR's risk mitigation provisions for uncleared derivatives will continue to apply to firms trading in the U.K. after exit. The draft EMIR Regulations transfer rule-making powers from EU institutions to the PRA and FCA.
- VI. **Equivalence:** the power to make third country regime equivalence determinations is transferred from the European Commission to HM Treasury.
- VII. **Intragroup Transactions:** After exit, permanent intragroup exemptions between U.K. and EU firms (which will become third country firms), and all temporary intragroup exemptions granted before exit day, will no longer apply in the U.K. The draft EMIR Regulations establish a temporary intragroup exemption regime to ensure that intragroup transactions can continue to be exempted from EMIR requirements. The temporary regime will initially last for three years after exit.
- VIII. **EMIR processes:** The draft EMIR Regulations amend or delete various processes or requirements for cooperation between U.K. and EEA regulators. This includes revoking and replacing EMIR provisions on TR disciplinary processes, appeals, fines, supervisory fees, penalties and other supervisory requirements. TRs were previously subject to central regulation and enforcement by ESMA. These procedures will in the future be covered by existing regulatory enforcement powers in the Financial Services and Markets Act 2000.

HM Treasury intends to lay the draft EMIR Regulations before Parliament before exit day.

The draft Regulations and explanatory guidance are available at:

<https://www.gov.uk/government/publications/draft-over-the-counter-derivatives-central-counterparties-and-trade-repositories-amendment-etc-and-transitional-provision-eu-exit-regulations>.

Details of the draft CCP regulations are available at <https://finreg.shearman.com/uk-legislation-published-for-a-post-brexite-recogn> and details of the draft trade repositories regulations are available at:

<https://finreg.shearman.com/draft-uk-post-brexite-legislation-to-onshore-trade>.

UK Government Publishes Guidance on Proposed Legislation to Onshore EU Legislation on Financial Conglomerates and Groups

On October 22, 2018, HM Treasury published explanatory information on the draft Financial Conglomerates and Other Financial Groups (Amendment) (EU Exit) Regulations 2018, which it intends to publish in due course. The draft Regulations will amend deficiencies in the U.K. legislation that implemented the EU Financial Conglomerates Directive. FICOD sets out specific solvency requirements designed to prevent different entities in a conglomerate from using the same capital more than once as a buffer against risk. The Directive also sets out requirements for management controls, risk management and for information sharing between relevant regulators of conglomerates. In the U.K., FICOD has been implemented by the Financial Conglomerates and Other Financial Groups Regulations 2004, as well as through provisions in regulatory rulebooks.

The explanatory information explains that the draft Regulations will amend several deficiencies to ensure the U.K.'s FICOR Regulations remain operative in a U.K.-only context.

- I. The definition of a financial conglomerate will be amended such that at least one entity in the group must be located within the U.K., rather than the EEA (as currently), while the other(s) may be located anywhere in the world. This is in line with the U.K.'s general approach of treating the EU as a third country after Brexit.
- II. The definition of "competent authority" will be amended to mean only U.K. regulators.
- III. Functions specified in FICOR as required to be carried out by the European Supervisory Authorities will be transferred to the relevant U.K. regulators.
- IV. Provisions requiring information sharing with EU authorities will be amended so that information sharing and other coordination is at the discretion of U.K. authorities but no longer mandatory.
- V. All Binding Technical Standards under FICOD will be carried through into U.K. law, with responsibility given to the FCA and PRA for their onshoring and subsequent maintenance. The FCA and PRA will consult on proposals for onshoring the relevant BTS.

The full text of the explanatory information is available at: <https://www.gov.uk/government/publications/draft-financial-conglomerates-and-other-financial-groups-amendment-eu-exit-regulations-2018/draft-financial-conglomerates-and-other-financial-groups-amendment-eu-exit-regulations-2018-explanatory-information>.

Draft UK Post-Brexit Legislation Published to Onshore the EU Central Securities Depositories Regulation

On October 22, 2018, HM Treasury published a draft of the Central Securities Depositories (Amendment) (EU Exit) Regulations 2018, along with explanatory information. The draft Regulations:

- make technical changes to address deficiencies in the retained EU Central Securities Depositories Regulation and related U.K. implementing legislation, to ensure that the U.K. regulatory framework for CSDs remains operative in the event of a "no-deal" scenario, in which the U.K. exits the EU on March 29, 2019 without a ratified Withdrawal Agreement. A "no-deal" scenario would mean that there would be no transitional period following Brexit and that the U.K. would be treated as a third country by the EU after exit day;
- transfer to HM Treasury the power currently exercised by the European Commission to make equivalence determinations in respect of non-U.K. regimes for regulating CSDs;
- transfer the powers currently exercised by the European Securities and Markets Authority to the Bank of England to enable the BoE to recognize third country CSDs after exit day; and
- amend the CSDR transitional regime so that third country CSDs can continue to provide services relating to the U.K. after Brexit. Third country CSDs (including EU CSDs authorized in the EU before exit day) must notify the BoE before exit day of their intention to provide services in the U.K. following Brexit and risk public censure if they fail to do so. Any third country CSDs that are benefitting from CSDR transitional arrangements at the point of exit, and any U.K. CSDs that have applied for authorization prior to exit, will be subject to existing U.K. law rather than the CSDR.

The draft Regulations are primarily relevant for CSDs operating in the U.K. at the point of exit and CSDs that are currently providing services relating to the U.K. as defined in the CSDR. The draft Regulations are also relevant for end-users of CSD services, market infrastructures with links to U.K. CSDs and firms that undertake settlement internalization. CSDs that also provide settlement services will also find relevant the U.K. government's announcement in July 2018 that it proposes to legislate to ensure the continuation, post-Brexit, of U.K. settlement finality protections currently provided under the Settlement Finality Directive.

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The draft Regulations contain a number of changes to CSDR, which are intended to give effect to Brexit and establish a U.K. regime for CSDs, some of which might not have been expected. First, the settlement discipline regime provided for in the CSDR is not scheduled to come into force until September 2020 and accordingly will not be in force before exit day. Furthermore, it seems intended that the current settlement discipline regime will not become U.K. law, at least on exit day, as the draft Regulations remove from the retained CSDR the provisions that would operate to bring it into force. In the explanatory information provided, HM Treasury states that the settlement discipline regime will not appear in the onshored version of the CSDR. However, the draft Regulations do not delete the relevant operative provisions from the retained CSDR, which is somewhat surprising and raises uncertainty as to their status. The intention seems to be that a subsequent SI will bring into force a U.K. version of the settlement discipline provisions. This leads to at least a certain amount of legal and operational planning uncertainty for U.K. market participants compared to the EU27 position, given that technical standards under these provisions have now been published, allowing firms subject to the EU27 rules to plan in a way that U.K. firms cannot presently.

In addition, various of the access provisions (concerning access rights between issuers and CSDs or between CSDs and CCPs) have been expanded so as apparently to create new rights on third country issuers and CCPs to access U.K. CSDs, which are not found in CSDR:

- the wording of the draft Regulations amends the retained CSDR to broaden the CSDR provisions on access rights, in that, as currently drafted, the application of those provisions to third country (i.e. non-U.K.) CSDs includes third country CSDs that have not been recognized by the BoE; and
- as drafted, the draft Regulations confer rights on non-U.K. issuers of securities to have their issues recorded in a U.K. CSD.

HM Treasury intends to formally lay the Regulations before Parliament before exit day. The draft Regulations will enter into force partly on the day after the day on which they are made, with the remainder of the Regulations entering into force on exit day.

Separately, the BoE and the U.K. Prudential Regulation Authority (as appropriate and in consultation with the U.K. Financial Conduct Authority) will update the relevant binding technical standards to align them with the provisions of the draft Regulations. The BoE intends to consult on the changes in autumn 2018.

The draft Regulations are available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750361/Draft_CSDR_SI_Text.pdf, and the explanatory information is available at:

<https://www.gov.uk/government/publications/draft-central-securities-depositories-amendment-eu-exit->

[regulations-2018/draft-central-securities-depositories-amendment-eu-exit-regulations-2018-explanatory-information.](#)

Competition

UK Competition and Markets Authority Consults on Further Working Paper in Investment Consultants Market Investigation

On October 25, 2018, the U.K. Competition and Markets Authority published an updated working paper on its “market outcomes” analysis, following responses to its July 2018 consultation on its Provisional Decision Report on its Market Investigation into the supply and acquisition of investment consultancy services and fiduciary management services.

The updated analysis covers: (a) gains from engagement—the impact of engagement on the fees paid by fiduciary management and investment consultancy customers; and (b) the relationship between quality and market success—the relationship between quality of service and market shares for a sample of investment consultancy firms. The CMA has also published a final notice of its intention to operate a confidentiality ring in respect of specified data submitted by respondents to the Provisional Decision Report. Access to the confidentiality ring will be granted to a limited number of approved external legal and/or economic advisers of certain parties. The confidentiality ring will operate from 9:30am on October 29, 2018 until 5:00pm on November 5, 2018.

Comments on the updated working paper are invited by November 5, 2018. While the statutory deadline for conclusion of the investigation is March 13, 2019, the CMA intends to publish its Final Report on the investigation in December 2018.

The CMA’s updated working paper on market outcomes is available at:

https://assets.publishing.service.gov.uk/media/5bd1966640f0b604de423c93/Market_Outcomes_Working_Paper_Post_PDR_Update.pdf. The final notice of the CMA’s intention to operate a confidentiality ring is

available at:

https://assets.publishing.service.gov.uk/media/5bd1818ced915d78b48aabbe/notice_of_intention_to_operate_cr.pdf.

Financial Services

European Commission Announces Work Plan for 2019

On October 23, 2018, the European Commission published a Communication, outlining its work plan for 2019. The Communication is addressed to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Communication discusses the ongoing challenges for the EU in the run-up to the European Parliamentary elections and the post-Brexit Summit in Sibiu at which a new multi-annual framework for the EU27 will be finalized.

Separately published Annexes to the Communication relating to: (i) new initiatives; (ii) REFIT initiatives; (iii) priority pending proposals; (iv) legislative initiatives that have been withdrawn; and (v) a list of envisaged repeals. Priority pending proposals of particular relevance to financial institutions include legislative proposals relating to the forthcoming sustainable finance package, cross-border distribution of collective investment schemes, crowdfunding, amendments to the European Market Infrastructure Regulation, prudential regulation and supervision of investment firms and a proposed amending regulation relating to minimum loss coverage for non-performing exposures.

In the context of Brexit, pending proposals relating to the tasks, governance and financing of the European Supervisory Authorities are likely to be particularly relevant. In the Communication, the Commission confirms that, in addition to the six legislative acts that have been tabled in relation to Brexit, two further acts (relating to visa status of U.K. nationals and to energy efficiency) will be tabled in November 2018 and that, by the end of 2018, a number of further delegated and implementing acts will also be presented.

The European Commission Communication can be viewed at:

https://ec.europa.eu/info/sites/info/files/cwp_2019_en.pdf.

The Commission Work Programme Key Documents can be viewed at:

https://ec.europa.eu/info/publications/2019-commission-work-programme-key-documents_en.

FinTech

EU Supervisory Authority Reports on ICO and Crypto-Asset Risks and Potential Regulation

On October 19, 2018, ESMA published an own-initiative report prepared by its Securities and Markets Stakeholder Group. The purpose of the report is to provide advice to ESMA on steps it might take to contain the risks of Initial Coin Offerings and crypto-assets, on top of existing regulation.

In the report, the term “crypto-assets” is used to refer to coins, tokens, virtual and cryptocurrencies or other digital or virtual assets collectively. The acronym ‘ICO’ is used to refer to an initial offering of any crypto-asset. The report sets out a taxonomy of crypto-assets, based on the distinction between payment tokens, utility tokens, asset tokens and hybrids used by the Swiss Financial Market Supervisory Authority (FINMA).

The SMSG has considered the potential benefits and risk of payment tokens, utility tokens and asset tokens. It has also conducted an analysis on whether asset tokens fall within the existing EU regulatory perimeter, by virtue of being classifiable as financial instruments (under the Markets in Financial Instruments legislation and the Market Abuse Regulation) and/or transferable securities (under the Prospectus Regulation). The SMSG has identified several areas in which ESMA could provide Guidelines or focus its supervisory convergence work.

Specifically, the SMSG advises that ESMA should issue “Level 3” Guidelines or work towards supervisory convergence as follows:

- I. ESMA should clarify whether the MiFID II definition of “transferable securities” covers transferable asset tokens that have features of transferable securities and should also clarify whether these tokens fall within the remit of the Prospectus Regulation.
- II. ESMA should provide further guidance on the MiFID II definition of “commodities,” as this definition is relevant in determining whether or not an asset token with features typical of a derivative is a MiFID financial instrument.
- III. ESMA should clarify whether the organization of a secondary market in asset tokens that qualify as MiFID financial instruments classifies as an MTF or an OTF.
- IV. ESMA should clarify that, when issuers of asset tokens are to be considered to organize an MTF or an OTF, the Market Abuse Regulation will apply.
- V. ESMA should clarify that MiFID II authorization as an investment firm is required (unless an exemption applies) in all cases where persons give investment advice on, or execute orders in, asset tokens that are considered MiFID financial instruments.
- VI. ESMA should consider writing to the European Commission to ask it to consider adding transferable payment and utility tokens to the list of MiFID financial instruments, on the basis that their inherent transferability and fungibility give rise to investor protection concerns and market abuse risk. The effect of this change would be that secondary markets in such payment tokens would also qualify as MiFID MTFs or OTFs subject to the MAR. Advisers in respect of such tokens would also be subject to MiFID II.

- VII. ESMA should encourage coordination in national approaches by preparing guidelines with minimum criteria for national authorities that operate or want to operate a sandbox or innovation hub. Such criteria might include scope, operating conditions, investor protection measures and transparency.

The report of ESMA's SMSG is available at: https://www.esma.europa.eu/sites/default/files/library/esma22-106-1338_msg_advice_-_report_on_icos_and_crypto-assets.pdf.

Recovery & Resolution

European Commission Adopts Technical Standards for Eligibility for Simplified Obligations Under the Bank Recovery and Resolution Directive

On October 25, 2018, the European Commission adopted a draft Delegated Regulation under the Bank Recovery and Resolution Directive, setting out Regulatory Technical Standards specifying the criteria for assessing the impact of an institution's failure on financial markets, on other institutions and on funding conditions.

Under the BRRD, where a national regulator or resolution authority is determining whether to grant simplified obligations to an institution, it must assess the impact that the failure of the institution could have due to a number of factors specified in the BRRD. The European Banking Authority submitted final draft RTS to the European Commission in December 2017. The RTS adopted by the Commission set out a two-stage test based on quantitative and qualitative criteria to determine whether an institution is eligible for simplified obligations. Institutions meeting quantitative criteria at stage one must then meet qualitative criteria at stage two to be assessed as eligible.

The draft Delegated Regulation will now be subject to a three-month scrutiny period by the European Parliament and the Council of the European Union. Assuming no objections have been raised by the co-legislators during that period, the Delegated Regulation will then be published in the Official Journal of the European Union and enter into force 20 days later. Once in force, the delegated regulation will have direct effect across the EU and will replace existing EBA Guidelines on simplified obligations.

The draft Delegated Regulation is available at <https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-6901-F1-EN-MAIN-PART-1.PDF> and the Annexes are available at: <https://ec.europa.eu/transparency/regdoc/rep/3/2018/EN/C-2018-6901-F1-EN-ANNEX-1-PART-1.PDF>.

Securities

UK Conduct Regulator Evaluates Impact of UK Benchmark Reform Since 2015

On October 22, 2018, the U.K. FCA published an evaluation paper on the impact of bringing seven additional benchmarks within the U.K.'s regulatory and supervisory perimeter in April 2015, in response to the recommendations of the Fair and Effective Markets Review. The necessary changes to the FCA's Handbook and guidance were effected by the Benchmarks (Amendment) Instrument 2015, a legal instrument made by the FCA. In the evaluation paper, the FCA clarifies that this benchmarks-related evaluation does not cover changes due to other policies that affect benchmarks, such as the EU Benchmarks Regulation or principles set by EU or international bodies.

The evaluation has been conducted in line with the FCA's approach to ex-post evaluation of the impact of its work, which it outlined in a discussion paper in April 2018. The FCA has conducted the benchmarks-related evaluation to understand: (i) the impact of the Benchmarks (Amendment) Instrument 2015 on markets and

firms' costs; and (ii) whether the FCA's regulatory intervention met its objective of increasing the robustness of benchmarks and restoring market confidence.

The evaluation paper describes the FCA's approach to the evaluation, including its scope, methodology and expected outcomes. The key findings were that:

- benchmark integrity has improved and there may have also been potential positive side-effects on the integrity of non-regulated benchmarks due to firms' extension of controls to them as well as to regulated benchmarks;
- the intervention seems to have been beneficial for already liquid markets (especially swap markets) but, for less liquid markets, the perceived increase in regulatory risk may have changed traders' behavior and contributed to a further reduction in the liquidity observed; and
- the incremental costs due to the FCA's regulation of the additional benchmarks was in line with its estimates.

The FCA will apply the lessons learned from the evaluation to its current and future work.

The evaluation paper is available at: <https://www.fca.org.uk/publication/corporate/evaluation-paper-18-2-the-impact-of-bringing-additional-benchmarks-into-the-regulatory-and-supervisory-regime.pdf>.

Upcoming Events

November 28-29, 2018: EBA 7th Annual Research Workshop - Reaping the benefits of an integrated EU banking market

Upcoming Consultation Deadlines

November 2, 2018: FCA discussion paper on the potential introduction of a new duty of care for financial services firms

November 2, 2018: FCA consultation on enforcement powers under the Securitization Regulation

November 12, 2018: PRA consultation on overlapping Liquidity Reporting templates under new Pillar 2 framework

November 19, 2018: Comment deadline for OCC proposal to permit certain federal savings associations to operate with national bank powers

November 27, 2018: EBA consultation on revised ITS for supervisory reporting under the CRR

December 4, 2018: Deadline for FDIC request for comment with respect to improving communication, transparency and accountability

December 7, 2018: FCA consultation on Brexit-Related Handbook Changes and Binding Technical Standards

December 7, 2018: FCA consultation on the temporary permissions regime for EEA firms and investment funds

December 12, 2018: PRA consultation on revisions to supervisory reporting requirements

December 14, 2018: Deadline for Federal Reserve Board request for comment with respect to facilitating faster payment systems

January 15, 2019: FCA consultation on climate change and green finance

January 16, 2019: Basel Committee consultation on leverage ratio treatment of client-cleared derivatives

January 25, 2019: FCA consultation on open-ended funds and illiquid assets

January 31, 2019: PRA consultation on managing financial risks from climate change

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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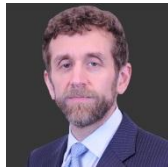
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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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