SHEARMAN & STERLING

FINANCIAL REGULATORY DEVELOPMENTS FOCUS

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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.

Click here if you wish to access our Financial Regulatory Developments website.

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Bank Prudential Regulation & Regulatory Capital

European Banking Authority Final Guidelines on Managing Non-Performing and Forborne Exposures

On October 31, 2018, the European Banking Authority published a final report setting out finalized Guidelines on management of non-performing exposures (NPEs) and forborne exposures (FBEs). The EBA consulted on a draft of the Guidelines in March 2018. The aim of the Guidelines is to help to reduce NPEs on banks' balance sheets by providing supervisory guidance to ensure that credit institutions effectively manage NPEs and FBEs on their balance sheets.

The final Guidelines cover: (i) key elements for developing and implementing an NPE strategy; (ii) the key elements of governance and operations in relation to an NPE workout framework; (iii) governance and operations in relation to FBEs; (iv) governance and operations for NPE recognition; (v) NPE impairment measurement and write-offs; (vi) collateral valuation of immovable and movable property; and (vii) supervisory evaluation of management of NPEs and FBEs.

The Guidelines will apply from June 30, 2019. Credit institutions should calculate their NPL ratios using the reference date of December 31, 2018.

The final report is available at: http://www.eba.europa.eu/documents/10180/2425705/Final+Guidelines+on+management+of+non-performing+and+forborne+exposures.pdf and details of the EBA's consultation on the Guidelines are available at: https://finreg.shearman.com/european-banking-authority-seeks-feedback-on-draf.

EU Amending Legislation Published for Liquidity Coverage Requirement

On October 30, 2018, an Amending Regulation supplementing the Capital Requirements Regulation was published in the Official Journal of the European Union, following its adoption in July 2018 by the European Commission. The Amending Regulation, which relates to the Liquidity Coverage Requirement for credit institutions, makes changes to the existing Delegated Regulation on the LCR with the objective of improving its practical application. The existing Delegated Regulation sets out detailed requirements on the LCR and specifies which assets are to be considered as liquid (so-called high quality liquid assets) and how the expected cash outflows and inflows over a 30-day stressed period are to be calculated.

The Amending Regulation makes the following changes:

I. full alignment of the calculation of the expected liquidity outflows and inflows on repurchase agreements, reverse repurchase agreements and collateral swaps transactions with the international liquidity standard developed by the Basel Committee on Banking Supervision;

II. treatment of certain reserves held with third-country central banks;

III. waiver of the minimum issue size for certain non-EU liquid assets;

IV. the application of the unwind mechanism for the calculation of the liquidity buffer; and

V. integration in the existing Delegated Regulation of the new criteria for simple, transparent and standardized securitizations.

The Amending Regulation will enter into force on November 19, 2018 and will apply directly across the EU from April 30, 2020.

The Amending Regulation is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1620&from=EN.

UK Prudential Regulator Updates Approach Document on Banking Supervision

On October 31, 2018, the U.K. Prudential Regulation Authority published an updated version of its document entitled "The Prudential Regulatory Authority's approach to banking supervision." The document replaces the previous version that was dated March 2016.

In the latest update, the PRA removed duplicative information and replaced some text with links to information contained in legislation or other material on the PRA's or Bank of England's website. The update includes a new foreword by the PRA's Chief Executive Officer, Sam Woods.

The update includes two new chapters, on identifying the risks to the PRA's objectives and on how the PRA tailors its supervisory approach. A number of new sections to existing chapters have also been added, covering safety and soundness and the stability of the financial system, the PRA's regulatory principles and operational resilience. Further detail in areas such as capital and resolvability is also added.

The Updated Approach Document is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2018.pdf.

Bank Structural Reform

UK Prudential Regulator Publishes Information Pack on Ring-Fencing Reporting Requirements

On October 31, 2018, the U.K. PRA published an information document entitled "Ring-fencing: Summary of regulatory reporting requirements." The document summarizes the regulatory reporting and reporting system requirements for ring-fencing that will apply to U.K. banking groups within the scope of the U.K.'s structural reform requirements coming into force on January 1, 2019. The information document is designed to assist firms that must submit ring-fencing regulatory returns.

The PRA states that the information document is not intended to supersede the PRA Rulebook, the regulatory reporting and the structural reform sections of the BoE's website and relevant and applicable published PRA policy. Affected firms should also continue to refer to these sources to determine their regulatory obligations.

The information document is available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/structural-reform/ring-fencing-summary-of-regulatory-reporting-requirements-oct-18.pdf.

Brexit for Financial Services

UK Legislation Published to Onshore the EU Venture Capital Funds and Social Entrepreneurship Funds Regulations for Brexit

On October 31, 2018, HM Treasury published the draft Venture Capital Funds (Amendment) (EU Exit) Regulations 2018 and the draft Social Entrepreneurship Funds (Amendment) (EU Exit) Regulations 2018, along with explanatory information. HM Treasury is also preparing draft Long-term Investment Funds (Amendment) (EU Exit) Regulations 2018 and will publish these in due course.

These draft "onshoring" statutory instruments will amend deficiencies in the retained versions of the following directly applicable EU Regulations:

I. the European Venture Capital Funds (EuVECA) Regulation, which governs funds that invest into small and medium-sized enterprises;

II. the European Social Entrepreneurship Funds (EuSEF) Regulation, which governs funds that invest into social investments; and

III. the European Long-term Investment Funds (ELTIF) Regulation, which governs funds that invest into infrastructure and other long-term projects.

The draft regulations will create a U.K.-specific regime, which will enable eligible funds to obtain "Social Entrepreneurship Funds" (SEF), "Registered Venture Capital Funds" (RVECA) and "Long-term Investment Fund" (LTIF) designations. U.K. managers of EuVECAs, EuSEFs and ELTIFs already authorized or registered with the U.K. Financial Conduct Authority would be automatically included in the U.K. regime. The draft regulations maintain the existing investment rules for EuVECAs, EuSEFs and ELTIFs domiciled in the U.K., allowing U.K. funds to invest in EEA assets in the same way as they currently do, this being an unusual preferential treatment for EEA assets over third-country assets within the U.K.'s draft Brexit legislation.

As EuVECAs, EuSEFs and ELTIFs are types of Alternative Investment Funds, their managers also need to comply with provisions of the Alternative Investment Fund Managers Directive, for which HM Treasury has separately published the draft Alternative Investment Fund Management (Amendment) (EU Exit) Regulations 2018 to "onshore" the AIFMD. In a "no deal" scenario where the U.K. exits the EU on exit day without a negotiated withdrawal agreement, the existing marketing passports under the AIFMD and the EuVECA and EuSEF Regulations would be lost. The government has legislated for a Temporary Permissions Regime for EEA AIF firms and AIF funds. Under this regime, EEA funds that have a U.K. passport before exit day may continue to be sold and invested by U.K. market participants for a limited period after exit day. The separately published AIFMD onshoring legislation sets out the design and structure of such a temporary permissions regime for all EEA AIFs, including EuVECAs, EuSEFs and ELTIFs.

HM Treasury intends to lay the draft RVECA Regulations and SEF Regulations before Parliament prior to exit day.

The draft RVECA Regulations are available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752800/EuVECA_Draft_SI_text.pdf, the draft SEF Regulations are available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752802/EuSEF_Draft_SI_text.pdf, the explanatory information is available at: https://www.gov.uk/government/publications/draft-eu-exit-sis-for-investment-funds-and-their-managers/venture-capital-funds-amendment-eu-exit-regulations-2018-social-entrepreneurship-funds-amendment-eu-exit-regulations-2018-and-long-term-inve, details of the draft AIFMD onshoring legislation are available at: https://finreg.shearman.com/draft-uk-post-brexit-legislation-to-onshore-alter and details of the Temporary Permissions regime for EEA firms and funds are available at: https://finreg.shearman.com/uk-secondary-legislation-published-for-post-brexi.

UK Post-Brexit Legislation Published to Onshore the EU Payment Accounts Directive for Brexit

On October 31, 2018, HM Treasury published a draft of the Payment Accounts (Amendment) (EU Exit) Regulations 2018, along with explanatory information.

The draft Regulations will amend the U.K. Payment Accounts Regulations 2015, which implemented the EU Payment Accounts Directive in the U.K., to remove references to EU institutions and to remove requirements which were intended to improve the functioning of the EU's internal market.

The draft Regulations will affect all Payments Service Providers that offer payment accounts, and, in particular, the U.K.'s nine designated providers of basic bank accounts. Consumers of payment accounts will also be affected, in particular those who hold basic bank accounts. HM Treasury states that it expects the changes for payment account providers and consumers to be minimal.

Among other things, the draft Regulations:

I. transfer responsibility from the EBA for Implementing Technical Standards on the documents that set out fees and charges to the U.K. FCA;

II. remove requirements for HM Treasury to report to the EU Commission or for the FCA to review the linked services list (i.e., the U.K.'s list of the most representative services linked to U.K. payment accounts) in line with revisions made by the EBA to the EU standardized terminology; and

III. remove the requirement on U.K. payment account providers to facilitate cross-border opening of accounts, so that U.K. payment account providers will not be obliged (but will have discretion) to continue to offer basic bank accounts to EU residents after Brexit. The U.K.'s nine designated providers of basic bank accounts will also have discretion whether to offer cash withdrawal or payment transactions either outside the U.K. or in a currency other than sterling on any basic bank account (including those held by U.K. residents).

HM Treasury intends to lay the Draft Regulations before Parliament in the autumn.

The draft Regulations are available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752789/Payment_Accounts_Draft_SI.PDF, the explanatory information is available at: https://www.gov.uk/government/publications/draft-payment-accounts-amendment-eu-exit-regulations-2018/payment-accounts-amendment-eu-exit-regulations-2018-explanatory-information and the linked services list is available at: https://www.fca.org.uk/publication/feedback/payment-accounts-regulations-final-linked-services-list.pdf.

UK Legislation Published to Preserve Settlement Finality Designation Post-Brexit

On October 31, 2018, HM Treasury published a draft of the Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2018. These draft Regulations introduce changes across various pieces of legislation relevant to financial market infrastructure to implement Brexit, namely the Settlement Finality Regulations, the Companies Act 1989, the Financial Collateral Arrangements (No.2) Regulations and the Banking Act 2009, so that U.K. domestic law concerning financial market infrastructure insolvency can continue to operate effectively after the U.K. leaves the EU.

The draft Regulations are designed to maintain legal certainty for EU systems that conduct business with U.K. participants, by providing for the continuation of U.K. settlement finality protections currently provided under the Settlement Finality Directive.

The SFD establishes various insolvency carve-outs for designated market infrastructure systems and provides for finality of transactions within such systems. Under the protections currently afforded by the SFD (implemented in the U.K. by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999), transfer orders which enter into designated systems within certain deadlines are guaranteed to be finally settled and cannot be unwound at the behest of insolvency officials, regardless of whether the sending participant has become insolvent or transfer orders have been revoked in the meantime. This also gives certainty as regards holdings in central securities depositories and as to the finality of transactions in some clearing and payment systems. Under the SFD, each EU Member State automatically recognizes systems that have been designated by other Member States. However, on the U.K.'s withdrawal from the EU, the U.K. will no longer fall within the SFD framework for automatic recognition and, without more, EU systems would not be recognized in the U.K.

The draft Regulations will allow designations to be made, under domestic law, of non-U.K. financial market infrastructures, including FMIs outside the EU. The BoE is empowered under the draft Regulations to grant permanent designation to non-U.K. FMIs and non-U.K. central banks.

The draft Regulations provide for a temporary designation regime to enable EU systems currently designated under the SFD to be grandfathered into U.K. SFD protections upon Brexit, in advance of permanent designation being granted. The temporary designation regime will last for three years from exit day, with a power for HM Treasury to extend the regime by no more than 12 months at a time if it is necessary and proportionate to avoid disruption to U.K. financial stability. Any system that has protections under the Settlement Finality Regulations at the point of the U.K.'s exit from the EU will not have to reapply for designation from the BoE. Such systems will continue to receive these protections under U.K. law after Brexit. Furthermore, protections under the existing SFRs will continue to apply to transactions entered into prior to exit day.

The BoE will maintain a public list of systems (and central banks) that are within the U.K. SFRs, the temporary regime and the non-U.K. regime.

In July 2018, the BoE sent a "Dear CEO" letter to the operators of systems currently designated under the SFD, explaining that the BoE anticipated that the U.K. legislation would, in essence, impose the same designation requirements as are currently required under the U.K. legislation implementing the SFD. The BoE outlined in the Dear CEO letter how it envisaged the designation process would take place, the requirements for, and the effect of, obtaining temporary U.K. designation and which systems would need U.K. designation post-Brexit.

The draft Regulations also make a number of technical changes to other pieces of legislation mentioned in the first paragraph, in order to implement Brexit in a U.K. context and remove certain preferential statuses afforded to EU systems or market infrastructure in situations where the same are not recognized in the U.K. under relevant temporary permission or post-Brexit authorization or recognition regimes.

The draft Regulations are available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752797/Financial_Markets_Insolvency_Draft_SI_Text.pdf, the explanatory information is available at: https://www.gov.uk/government/publications/draft-financial-markets-and-insolvency-amendment-and-transitional-provision-eu-exit-regulations-2018/the-financial-markets-and-insolvency-amendment-and-transitional-provision-eu-exit-regulations-2018-explanatory-information and the BoE's July 2018 "Dear CEO" letter to EU systems is available at: https://www.bankofengland.co.uk/-/media/boe/files/letter/2018/letter-to-eu-systems-designated-under-the-settlement-finality-directive.pdf.

Compensation

UK Regulator Highlights Role of Remuneration Committee Chair as a Senior Manager

On November 1, 2018, the U.K. FCA published a letter (dated August 20, 2018) addressed to the Chair of the Remuneration Committee of banks and large investment firms (investment firms with total assets over £50 billion). The letter informs the Chair of how the FCA intends to assess the remuneration policies and practices of firms in 2018/19. Moreover, it sets out the impact of that approach for the Chair of the Remuneration Committee as a Senior Manager under the Senior Managers and Certification Regimes. The Chair of the Remuneration Committee of in-scope firms holds FCA Senior Manager Function 12. The FCA notes that its supervisors will be interacting with the Chair of the Remuneration Committee to ascertain how the Chair has determined that their firm's policies and practices promote the right behavior. The discussions will include an

assessment of how any issues from the 2017/18 remuneration round have been addressed. The FCA also highlights that a Chair of the Remuneration Committee should be satisfied that the level of ex post adjustments are appropriate and be capable of providing reasons for these adjustments. In addition, the FCA is adopting the same approach as the PRA and will no longer provide a non-objection statement to the proposed communication or distribution of variable remuneration awards by banks and large investment firms.

The letter is available at: https://www.fca.org.uk/publication/correspondence/2018-letter-remco-chairs-our-approach.pdf and details of the PRA's approach to the latest remuneration round are available at: https://finreg.shearman.com/uk-prudential-regulator-issues-update-to-level-on.

Competition

UK Competition Authority Consults on Draft Definitions in Investment Consultants Market Investigation

On November 2, 2018, the U.K. Competition and Markets Authority published a consultation entitled "Draft definitions of Investment Consultancy services and Fiduciary Management services to assist the CMA in its consideration of potential remedies," under its Market Investigation into these sectors. The CMA is in the process of reviewing the submissions made in response to the Provisional Decision Report it published in July 2018.

The consultation paper contains working draft definitions of "investment consultancy services" and "fiduciary management services" for the purposes of the remedies that the CMA may impose in any Order following the publication of its final report. The CMA seeks only high-level comments on the draft decisions. It proposes to consult separately in due course on any draft Order it may make.

Comments on the consultation are invited by November 9, 2018.

The CMA's final report on its Market Investigation is currently scheduled for publication in December 2018.

The consultation paper is available at: https://assets.publishing.service.gov.uk/media/5bdc1dabe5274a6e112470c7/Definitions_of_Fiduciary_management_services_and_Investment_Consultancy_services.pdf and details of the July 2018 Provisional Decision Report are available at: https://finreg.shearman.com/uk-competition-authority-consults-on-proposed-rem.

Derivatives

EU Authority Calls for Non-Enforcement of Impending Clearing Obligation for Intragroup Transactions and Non-Financial Counterparties

On October 31, 2018, the European Securities and Markets Authority issued a statement on the impending clearing obligation under the European Market Infrastructure Regulation. The statement is also relevant to the trading obligation under the Markets in Financial Instruments Regulation which is triggered by the EMIR clearing obligation.

EMIR provides an exemption from the clearing obligation for intragroup transactions with a third-country group entity where one of the counterparties is a third-country group entity and there is an equivalence decision in respect of the third country in which it is situated. An equivalence decision would enable parties that are subject to both the EU and a third country's clearing obligation to comply only with one jurisdiction's requirements, but no equivalence decisions have been made to date for these purposes.

December 21, 2018 is the expiry date for the exemption from the clearing obligation for interest rate derivative classes denominated in the G4 currencies subject to the clearing obligation. In addition, December 21, 2018 is the clearing obligation start date for non-financial counterparties that exceed the clearing threshold for this class of derivatives. When an NFC exceeds the clearing threshold in one asset class, it must clear all derivative classes that are subject to mandatory clearing. Proposed EMIR Refit amendments would amend this so that an NFC would only have to clear the asset class or classes where the clearing threshold has been exceeded. However, these changes are unlikely to be in force this year.

ESMA has submitted to the European Commission proposed amendments to the relevant secondary legislation relating to the intragroup transactions with a third-country group entity. ESMA's proposal is to extend the expiration date to December 21, 2020 for IRS derivatives denominated in G4 currencies and other currencies and credit derivatives.

Absent the required equivalence decisions and changes to the EU legislation, ESMA's statement clarifies that ESMA does not expect national regulators to focus on any non-compliance by groups or NFCs exceeding the clearing threshold. National regulators should apply a risk-based approach to supervising and enforcing the applicable legislation in a proportionate manner. ESMA confirms that neither it nor national regulators have the power to formally dis-apply the directly applicable EU legislation.

The U.K. FCA has issued a release supporting ESMA's statement. The FCA confirms that it will not require groups and NFCs that exceed the clearing threshold to put processes in place to comply with the IRS clearing obligation and the related trading obligation.

ESMA's statement is available at: https://www.esma.europa.eu/press-news/esma-news/esma-issues-clarifications-clearing-and-trading-obligations-ahead-21-december, details of ESMA's proposed amendments are available at: https://finreg.shearman.com/eu-final-report-to-extend-exemption-from-the-clea, details of the MiFIR trading obligation are available at: https://finreg.shearman.com/eu-derivatives-trading-obligation-enters-into-for and the FCA's release is available at: https://www.fca.org.uk/firms/european-market-infrastructure-regulation-emir/news.

Enforcement

UK Conduct Regulator Bans Former LIBOR Submitter From Performing Any Regulated Activity

On November 1, 2018, the U.K. FCA published the Final Notice (dated October 30, 2018) that it issued to a former employee of a major international bank, prohibiting him from performing any function relating to any regulated activity carried on by any authorized or exempt person, or exempt professional firm. The individual was convicted in June 2016 of conspiracy to defraud for manipulation of the U.S. Dollar LIBOR and sentenced to four years' imprisonment. The conviction related to misconduct between 2005 and 2007.

The FCA has concluded that the individual's criminal conviction for an offense of dishonesty, involving financial crime and market manipulation, demonstrates that he is not fit and proper to perform functions related to regulated activities. It considers that, while the misconduct occurred over ten years ago, its seriousness and the severity of the risk which the individual poses to consumers and to confidence in the financial system are such that it is appropriate to impose a prohibition order.

The Final Notice is available at: https://www.fca.org.uk/publication/final-notices/jonathan-mathew-2018.pdf.

FinTech

US State Regulators Sue Office of the Comptroller of the Currency Over FinTech Charter

On October 25, 2018, the Conference of State Bank Supervisors sued the U.S. Office of the Comptroller of the Currency to prevent it from granting charters for special purpose national banks to non-depository FinTech companies. The CSBS is the nationwide organization of state banking regulators in the United States.

The CSBS filed the lawsuit upon the OCC's announcement on July 31, 2018 that it would begin accepting these applications. The CSBS previously sued the OCC over its ability to provide SPNB charters in April 2017. The federal district court in D.C., however, dismissed the first suit for lack of subject matter jurisdiction and ripeness, stating that the OCC had not decided whether to grant SPNB charters to FinTech firms at that time.

The new CSBS lawsuit claims that the OCC's decision exceeds the agency's statutory authority under the National Bank Act, which mandates that the operations of federally chartered banks must be limited only to firms that engage in the "business of banking." The CSBS argued that taking deposits plays an inherent role in the "business of banking," therefore the OCC lacks the authority to award bank charters to non-depository institutions. The CSBS also believes the OCC's decision to accept SPNB charters is in violation of the Tenth Amendment, in that the OCC's oversight of non-depository institutions would preempt state regulation without Congressional authorization.

The CSBS also claimed that the OCC failed to adequately address public comments that expressed significant concerns with the SPNB charter, and that the charter's preemption of state regulatory authority harms state regulators by undermining their ability to enforce existing laws and regulations. Further, the CSBS argued that the OCC did not follow the proper notice and comment procedures applicable to preemption interpretations under the NBA, but rather relied on informal feedback in response to its white paper and policy statement detailing the SPNB charter.

This lawsuit follows a similar complaint recently filed against the OCC by Maria Vullo, the Superintendent of the New York Department of Financial Services, who claimed that the SPNB charter poses a threat to New York consumers and businesses. Superintendent Vullo argued that the risks associated with the SPNB charter include weakening of controls on predatory lending practices, creating more "too big to fail institutions" and putting smaller firms at a competitive disadvantage to large, well-capitalized FinTech firms. Superintendent Vullo also claimed that the OCC has exceeded its statutory authority under the NBA and that the OCC's decision to accept SPNB charters is in violation of the Tenth Amendment.

In the meantime, Comptroller of the Currency Joseph Otting has said he expects the agency to be ready to approve or deny applications for the charters by mid-2019.

The CSBS court filing is available at: https://www.csbs.org/sites/default/files/10.25.2018_complaint_csbs_v._otting_occ.pdf and the OCC's announcement is available at: https://www.occ.treas.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html.

UK Crypto-Assets Task Force Outlines the Path to Crypto-Asset Regulation

On October 30, 2018, the U.K. Crypto-Assets Task Force published its Final Report. Established in March 2018 by the U.K. Chancellor of the Exchequer as part of the U.K. government's FinTech Sector Strategy, the Task Force comprises representatives from HM Treasury, the U.K. FCA and the BoE.

The Task Force engaged with over 60 firms and other stakeholders to seek their views on topics including: the trajectory of the industry, the risks, benefits and underlying economic value of crypto-assets and the

U.K.'s future regulatory approach. Stakeholders were of the view that there is a lack of regulatory clarity in the U.K. and that regulation should be introduced to support the legitimate players in the crypto-assets market. It is also crucial in mitigating risks. There were also calls for regulatory and tax frameworks to be aligned.

The Final Report sets out an overview of crypto-assets and their underlying distributed ledger technology and assesses the associated risks and potential benefits. The Task Force considers that DLT has the potential to deliver significant benefits in both financial services and other sectors and all three authorities will continue to support its development. As a priority, the Task Force calls for strong action to be taken to address the risks associated with crypto-assets that fall within existing regulatory frameworks. It then sets out an approach to future crypto-assets regulation in the U.K., consistent with the need for the U.K. to maintain its international reputation for transparency and high regulatory and consumer protection standards for financial markets, while fostering innovation in the financial sector.

The Task Force considers how the current regulatory perimeter applies to different crypto-asset-related activities, using a high-level framework the Task Force has developed from its analysis of the types of crypto-assets and their common uses. As an important caveat, the Task Force stresses that whether and what regulation applies to a particular crypto-asset instrument or activity can only be decided on a case-by-case basis. This means that firms and persons involved in crypto-asset-related services or investments must consider carefully the extent to which their activities could involve regulated activities or the issuing of financial promotions. They should also bear in mind that some regulatory provisions in the FCA's Handbook can apply to unregulated activities.

The Final Report highlights key actions that the three authorities propose to take to develop and implement the U.K.'s policy and regulatory approach:

I. *by the end of 2018*: the FCA will consult on (i) guidance for crypto-asset activities currently within the regulatory perimeter; and (ii) a potential ban on the sale to retail consumers of derivatives referencing certain types of crypto-assets (for example, exchange tokens), including CFDs, options, futures and transferable securities;

II. *by early 2019*: HM Revenue and Customs will issue revised guidance on the tax treatment of crypto-assets;

III. *in early 2019*: HM Treasury will: (i) consult on transposing the Fifth Money Laundering Directive in the U.K. and further broadening anti-money laundering and counter-terrorist financing regulation; (ii) consult on potential changes to the regulatory perimeter to bring in crypto-assets that have comparable features to specified investments; and (iii) explore how exchange tokens might be regulated if necessary;

IV. *on an ongoing basis*: the PRA will assess the adequacy of the prudential regulatory framework, in conjunction with its international counterparts.

Additionally, all of the authorities will remain engaged on an ongoing basis in monitoring market developments, working towards a coordinated international response and supporting innovation with DLT.

The Final Report is available at: https://www.fca.org.uk/news/news-stories/cryptoasset-taskforce-publishes-report-uk-approach-cryptoassets, details of the Treasury Select Committee report following its Digital Currencies Inquiry are available at: https://finreg.shearman.com/uk-parliamentary-committee-calls-for-urgent-regul and details of the U.K. FinTech Sector Strategy are available at: https://finreg.shearman.com/uk-government-launches-fintech-sector-strategy.

Funds

EU Amending Legislation Published on Duties of Third-Party Custodians Safe-Keeping Fund Assets

On October 30, 2018, amending Delegated Regulations on the safe-keeping duties of depositaries, supplementing the AIFMD and the Undertakings for Collective Investment in Transferable Securities Directive, were published in the Official Journal of the European Union.

The amending Delegated Regulations were adopted by the European Commission in July 2018. They amend existing delegated regulations under AIFMD and UCITS relating to the safekeeping of AIF and UCITS clients' assets respectively, to ensure a more uniform approach is adopted across the EU. The amendments clarify that where a depositary for an AIF or UCITS delegates safe-keeping functions to a third party custodian, the clients' assets must be segregated at the level of the delegate (i.e., from the delegate's own assets but not from those of its other clients). This should prevent interpretation of the segregation obligations as requiring separate accounts per depositary and per type of fund at each level of the custody chain. The respective Delegated Regulations set out how that obligation should be fulfilled to ensure a clear identification of assets belonging to a particular AIF or UCITS and the protection of assets in the event of the depositary or custodian entering insolvency.

The amending Delegated Regulations enter into force on November 19, 2018 and will apply directly across the EU from April 1, 2020.

The amending Delegated Regulation under AIFMD ((EU) 2018/1618) is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1618&from=EN and the amending Delegated Regulation under UCITS ((EU) 2018/1619) is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1619&from=EN.

MiFID II

EU Contracts for Differences Product Intervention Measures Extended

On October 31, 2018, the European Securities and Markets Authority Decision renewing and amending the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients was published in the Official Journal of the European Union. ESMA announced on September 28, 2018 that the existing restriction would be extended and would include an additional reduced character risk warning because CFD providers have experienced technical difficulties in using the risk warnings due to the character limitations imposed by third-party marketing providers. The CFD Decision applies directly across the EU from November 1, 2018 for three months.

ESMA extended the temporary product intervention prohibiting the marketing, distribution and sale of binary options to retail investors for a further three months from October 2, 2018, although certain types of binary options were excluded from the scope of the prohibition because ESMA considers that those binary options are less likely to present a significant investor protection concern. Both of ESMA's product intervention measures are made using powers under the Markets in Financial Instruments Regulation.

The Decision is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018X1031(01)&from=EN and details of the extension of the ban relating to binary options are available at: https://finreg.shearman.com/european-securities-and-markets-authority-intends.

Recovery & Resolution

European Commission Adopts Revised Implementing Standards for Resolution Reporting

On October 29, 2018, the EBA announced that it acknowledged the European Commission's adoption of a draft Commission Implementing Regulation, setting out revised ITS on the procedures and standard forms and templates, to be used to provide information for the resolution plans of credit institutions and investment firms. The Implementing Regulation supplements the Bank Recovery and Resolution Directive and will repeal the existing ITS, reflecting the evolution in the policy and practices applied by authorities in the development of resolution plans for financial institutions. The EBA submitted its final report with final revised draft ITS to the European Commission in April 2018.

The draft Implementing 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. The Implementing Regulation sets out transition periods for firms that will apply to financial years ending between January 1 and December 31, 2018 and between January 1 and December 31, 2019. The transition periods will allow for a short deferral of the submission deadline for specified information.

The EBA's announcement is available at: http://www.eba.europa.eu/-/eba-acknowledges-adoption-of-new-resolution-reporting-standards-by-the-european-commission, the Implementing Regulation and Annexes are available at: http://ec.europa.eu/finance/docs/level-2-measures/brrd-its-2018-6841_en.pdf and https://ec.europa.eu/info/law/bank-recovery-and-resolution-directive-2014-59-eu/amending-and-supplementary-acts/implementing-and-delegated-acts_en and details of the EBA's final report are available at: https://finreg.shearman.com/european-authority-proposes-revised-techn.

Upcoming Events

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

Upcoming Consultation Deadlines

November 9, 2018: CMA consultation on definitions in Investment Consultants Market Investigation

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 2, 2019: BoE/PRA joint consultation on approach to amending financial services legislation under the European Union (Withdrawal) Act 2018

January 2, 2019: PRA consultation on changes to PRA Rulebook and onshored Binding Technical Standards for Brexit

January 2, 2019: BoE consultation on changes to FMI rules and onshored Binding Technical Standards for Brexit

January 2, 2019: BoE consultation on approach to resolution statements of policy and onshored Binding Technical Standards for Brexit

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:

CONTACTS

BARNEY REYNOLDS
Partner
London
barney.reynolds
@shearman.com

REENA AGRAWAL SAHNI
Partner
New York
reena.sahni
@shearman.com

RUSSELL SACKS
Partner
New York
rsacks
@shearman.com

THOMAS DONEGAN
Partner
London
thomas.donegan
@shearman.com

SUSANNA CHARLWOOD
Partner
London
susanna.charlwood
@shearman.com

DONNA PARISI
Partner
New York
dparisi
@shearman.com

NATHAN GREENE
Partner
New York
ngreene
@shearman.com

GEOFFREY GOLDMAN
Partner
New York
geoffrey.goldman
@shearman.com

JOHN ADAMS
Partner
London
john.adams
@shearman.com

PHILIP UROFSKY
Partner
Washington D.C.
philip.urofsky
@shearman.com

TOBIA CROFF
Partner
Milan
tobia.croff
@shearman.com

HERVÉ LETRÉGUILLY
Partner
Paris
hletreguilly
@shearman.com

MATTHEW READINGS
Partner
London
matthew.readings
@shearman.com

SIMON DODDS
Of Counsel
London
simon.dodds
@shearman.com

BRADLEY K. SABEL
Of Counsel
New York
bsabel
@shearman.com

TIMOTHY J. BYRNE
Counsel
New York
tim.byrne
@shearman.com

JENNIFER D. MORTON
Counsel
New York
jennifer.morton
@shearman.com

KOLJA STEHL
Counsel
Frankfurt/London
kolja.stehl
@shearman.com

ELIAS ALLAHYARI
Associate
London
elias.allahyari
@shearman.com

MATTHEW HUMPHREYS
Associate
London
matthew.humphreys
@shearman.com

THOMAS JONES
Associate
London
thomas.jones
@shearman.com

JENNY DING JORDAN
Associate
New York
jenny.jordan
@shearman.com

P. SEAN KELLY
Associate
New York
sean.kelly
@shearman.com

OLIVER LINCH
Associate
London
oliver.linch
@shearman.com

JENNIFER OOSTERBAAN
Associate
New York
jennifer.oosterbaan
@shearman.com

WILF ODGERS
Associate
London
wilf.odgers
@shearman.com

INYOUNG SONG
Associate
London
inyoung.song
@shearman.com

ELLERINA TEO
Associate
London
ellie.teo
@shearman.com

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069