SHEARMAN & STERLING LLP

FINANCIAL INSTITUTIONS ADVISORY & FINANCIAL REGULATORY GROUP
WEEKLY NEWSLETTER

Financial Regulatory Developments Focus

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In this issue:

In this newsletter, we provide a snapshot of the principal European, US and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructures, asset managers and corporates.

Derivatives

ESMA Consults on the Calculation of Counterparty Risk by UCITS

On 22 July 2014, the European Securities and Markets Authority ("ESMA") published a discussion paper seeking comments on its proposals for the calculation of counterparty risk by Undertakings for Collective Investment in Transferable Securities ("UCITS") for OTC derivative transactions subject to the clearing obligation under the European Market Infrastructure Regulation ("EMIR"). ESMA is concerned about the impact of a failing clearing member, or client of a clearing member, on a UCITS entering cleared OTC derivatives. UCITS are retail investment funds and are regulated across the EU to ensure investor protection. ESMA is seeking views on: (i) how a UCITS should calculate limits on counterparty risk in centrally cleared OTC derivative transactions; and (ii) whether the same rules should be applied by a UCITS for centrally cleared OTC transactions as for exchange-traded derivatives ("ETDs"). Under existing UCITS legislation, a UCITS' investments in OTC derivatives are subject to counterparty risk exposure limits. ETDs are not subject to the same limitation. The discussion paper is open until 22 October 2014.

The ESMA discussion paper is available at:
http://www.esma.europa.eu/news/ESMA-consults-counterparty-risk-calculation-methods-UCITS-subject-central-clearing?t=326&o=home

CFTC Issues Time-Limited No-Action Relief from Certain Requirements in the OCR Final Rule

On 23 July 2014, the US Commodity Futures Trading Commission's ("CFTC") Division of Market Oversight issued a no-action letter that provides additional time for reporting parties to comply with certain reporting requirements under the ownership and control final rule ("OCR Final Rule"). The OCR Final Rule, which was adopted on 18 November 2014, requires reporting parties to submit electronically trader identification and market participation data.

In the no-action letter, the CFTC provides time-limited no-action relief from the new electronic reporting requirements of the OCR Final Rule, subject to certain terms and conditions outlined in the no-action letter, including the requirement that reporting parties must continue to report via non-automated submission methods during the period of the relief.

The full text of the CFTC no-action letter is available at: http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-95.pdf

Bank Prudential Regulation & Regulatory Capital

Proposed Draft Technical Standards under Financial Conglomerates Directive

On 24 July 2014, the European Supervisory Authorities (ESMA, the European Banking Authority and the European Insurance and Occupational Pensions Authority, together, the "ESAs") published proposed draft regulatory technical standards ("RTS") under the Financial Conglomerates Directive. Pursuant to the Directive, financial conglomerates are subject to supplementary prudential supervision of any banking and insurance entities in the group. The draft RTS include proposals on (i) the reporting of information to national regulators and coordinators; (ii) the risk concentration and intra-group transactions at the level of the financial conglomerate that should be considered "significant" for the purpose of reporting obligations; (iii) the factors that national regulators and coordinators should consider when identifying types of significant risk concentration and setting thresholds for reporting requirements; and (iv) supervisory measures to assist in developing a harmonized approach to supervision of financial conglomerates. The consultation is open until 24 October 2014.

The proposed draft RTS are available at: http://www.eba.europa.eu/documents/10180/764919/JC-CP-2014-04+Joint+Consultation+Paper+draft+RTS+art+21a+1a+FICOD.pdf

UK FPC Consultation Period on Leverage Ratio Extended

On 22 July 2014, the Bank of England ("BoE") announced that the Financial Policy Committee's ("FPC") consultation period on the role of the leverage ratio within the capital framework had been extended to 12 September 2014 (from 14 August 2014). The consultation was originally published on 11 July 2014. The FPC's final review of the leverage ratio is expected to be published in November 2014.

Mark Carney, Governor of the BoE, confirmed in a letter to the Chair of the Treasury Select Committee, Andrew Tyrie, that the FPC will prepare a draft policy statement on the proposed leverage ratio direction powers in early 2015, which will include the FPC's views on calibration of the framework. The policy statement should inform the review of the FPC's powers on the leverage ratio framework.

The FPC's consultation paper is available here:
http://www.bankofengland.co.uk/financialstability/Documents/fpc/fs_cp.pdf

The BoE letter is available here:
http://www.bankofengland.co.uk/publications/Documents/news/2014/governorletter220714.pdf

Recovery & Resolution

UK Government and PRA Consult on BRRD Transposition

The UK Government and the Prudential Regulation Authority ("PRA") have both launched consultation papers on the transposition of the Banking Recovery and Resolution Directive ("BRRD"), which member states are obliged to transpose into national laws by 31 December 2014 and apply from 1 January 2015. The consultations are relevant to banks, building societies, large investment firms, financial holding companies, mixed financial holding companies and mixed-activity holding companies. The HM Treasury consultation covers only some aspects of transposition, including recovery and resolution planning, intra-group support, valuation, bail-in and write-down of capital instruments. Draft legislation on certain issues is also included. HM Treasury proposes that the Bank of England will be the UK resolution authority (as per the UK Banking Act 2009), the PRA and the Financial Conduct Authority ("FCA") will be the designated national regulators and that HM Treasury will be the competent ministerial authority for the purposes of the BRRD. The Government's consultation closes on 28 September 2014.

The PRA is proposing changes to both its current rules and its supervisory statement (which sets out the PRA's expectations of firms), covering recovery plans, resolution packs, intra-group financial support agreements, notification of failure or likely failure and contractual recognition of bail-in. The PRA consultation closes on 19 September 2014 and the PRA intends to publish a policy statement with feedback, final rules and an updated supervisory statement before the end of the year. The PRA notes that any proposals may be affected by the technical standards and guidelines still being prepared at EU level.

The HM Treasury consultation paper is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335755/PU1678_final__1_.pdf

The PRA consultation paper is available at:
http://www.bankofengland.co.uk/pra/Documents/publications/cp/2014/cp1314.pdf

Bank Structure

UK Ring-fencing Secondary Legislation Enacted

On 23 July 2014, UK secondary legislation detailing the types of entities that will not be considered as ring-fenced bodies under the Financial Services and Markets

Act 2000 (as amended by the Financial Services (Banking Reform) Act 2013) was enacted. The entities include insurance companies, banks which hold less than £25 million core deposits, credit unions, provident societies and institutions that would only have become ring-fenced as a result of action taken to stabilize a bank under the Banking Act 2009. The legislation also provides for the FCA to make rules on the information that a non ring-fenced body must provide to an individual account-holder. The secondary legislation comes into effect on 1 January 2015. The PRA and FCA are expected to consult on rules relating to ring-fencing in the autumn.

The secondary legislation is available at:
http://www.legislation.gov.uk/uksi/2014/1960/pdfs/uksi_20141960_en.pdf

Pensions Rules for UK Ring-fenced Banks: Consultation

On 24 July 2014, the UK Government launched a consultation on draft regulations requiring a ring-fenced bank to ensure that it is not, and cannot become, liable for the pension schemes of the rest of its group, except for those of other ring-fenced banks in its group or of a wholly-owned subsidiary. Under current UK pension law, within a group pension scheme, if one entity fails then the others can become obliged, in certain circumstances, to support the scheme. The ring-fencing legislation aims to protect ring-fenced banks from the liabilities that might arise in the event of the failure of another entity in the group. The proposed regulations are likely to result in the necessary restructuring of any existing multi-employer schemes to which a ring-fenced bank is an employer, including the segregation of assets and liabilities. Therefore the Government is also proposing conferring additional powers on trustees or managers of schemes to make such adjustments as may be needed to ensure compliance by a ring-fenced bank. The requirement for ring-fenced banks to ensure they will not be liable for the pension liabilities of other entities in its group comes into effect in 2026. However, some of the provisions which will allow relevant banks to begin planning and implementing restructuring will come into force in 2015. Responses to the consultation are due by 15 October 2014.

The consultation is available at:
https://www.gov.uk/government/consultations/banking-reform-draft-pensions-regulations

Financial Market Infrastructure

EU Council Adopts Central Securities Depositaries Regulation

On 23 July 2014, the Council of the European Union (the "Council") adopted the proposed regulation on improving securities settlement and regulating central securities depositaries ("CSDs") (the "CSD Regulation") with the aim of improving securities settlement within the EU. The CSD Regulation introduces a uniform set of rules for the settlement of financial instruments and on the organization and conduct of CSDs. The new regulation provides for a common

settlement period (no later than the second business day after a trade) and requires transferable securities to be recorded electronically (in book entry form) before they are traded on regulated venues. CSDs will be subject to authorization and supervision by home national regulators, although, an EU passport will be available. Certain restrictions on ownership rights of CSDs are also introduced to limit the risks of a CSD's activities. The CSD Regulation will enter into force 20 days after it is published in the Official Journal of the European Union.

The press release is available at:
http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/144110.pdf

European Commission Requests Technical Advice on CSD Regulation from ESMA

On 23 July 2014, ESMA published the request (dated 23 June 2014) from the European Commission for provisional technical advice from ESMA on the CSD Regulation. The requested technical advice relates to: (i) the calculation of a deterrent and proportionate level of cash penalties to be imposed on participants failing to deliver financial instruments on the agreed settlement date, taking into account asset type, liquidity of the financial instruments and the type of the transactions; and (ii) the assessment of "substantial importance" in the context of the cooperation arrangements between home and host national regulators for the supervision of a CSD where the activities of the CSD are "of substantial importance for the functioning of the securities markets and the protection of the investors" in the host Member State. Under the CSD Regulation, a CSD will be able to passport into other EU member states once authorized in its home member state. ESMA is required to deliver its technical advice nine months after the CSD Regulation enters into force, which is expected in September 2014.

The request is available at:
http://www.esma.europa.eu/page/Post-tradingSettlement-SFD-CSDR-T2S

EU Regulation of Systemically Important Payment Systems Enters into Force

On 23 July 214, the European Central Bank ("ECB") Regulation on oversight requirements for systemically important payment systems ("SIPS Regulation") entered into force. The SIPS Regulation implements the Committee on Payment and Settlement System ("CPPS") and International Organization of Securities Commissions ("IOSCO") principles for the effective oversight of Systemically Important Payment Systems ("SIPS"). The ECB Governing Council is responsible for deciding which payment systems are systemically important, according to defined criteria, as well as identifying their operators and national regulators. A SIPS will need to comply with the requirements of the SIPS Regulation within one year of being notified of the Governing Council's decision, which includes requirements relating to legal soundness, governance, management of risks, default procedures and disclosure obligations. The SIPS Regulation will come into effect on 15 August 2014.

The SIPS Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_217_R_0006&rid=1

IOSCO Review of Implementation of Principles for Financial Benchmarks by Administrators of LIBOR, EURIBOR and TIBOR

On 22 July 2014, IOSCO published its Review of Implementation of the Principles for Financial Benchmarks by Administrators of the London Interbank Offered Rate ("LIBOR"), the Euro Interbank Offered Rate ("EURIBOR") and the Tokyo Interbank Offered Rate ("TIBOR") (collectively, the "IBORs") ("the IOSCO Review"). The Review evaluates compliance with the IOSCO Principles for Financial Benchmarks (the "IOSCO Principles") by the administrators of the IBORs. IOSCO states that significant progress has been made in implementing the majority of the principles, though further work is required on implementing the principles on benchmark design, data sufficiency and transparency of benchmark determinations. The review sets out recommended remedial action to be taken by each administrator, and IOSCO expects each administrator to submit a work plan to its regulator. A further implementation review will occur in mid-2015, to assess progress made by the administrators in implementing the remedial actions.

The IOSCO review is available here:
http://www.financialstabilityboard.org/publications/r_140722a.pdf

FSB Publishes Report on Reforming Major Interest Rate Benchmarks

On 22 July 2014, the Financial Stability Board ("FSB") published a report on the reform of major interest rate benchmarks, the main benchmarks being the IBORs (see above). The FSB recommends a multiple-rate approach to the strengthening of existing IBORs, as well as other potential reference rates based on unsecured bank funding costs by underpinning them with transaction data as much as possible (the enhanced rates are referred to as "IBOR+"). The FSB also recommends developing alternative and nearly Risk-Free Rates ("RFRs"), which it considers would be more suitable to certain financial transactions, including many derivative transactions. The FSB will supervise and monitor the implementation of the recommended reforms. Concrete proposals and timelines for the strengthening of existing benchmarks and further work on the development and introduction of additional benchmarks are set out in the report. IBOR administrators are consulted on any recommended changes relating to IBOR+ before the end of 2015. At least one IOSCO-compliant RFR is to be implemented by central banks and supervisory authorities by the second quarter of 2016. The FSB is expected to produce a final monitoring report in 24 months' time and an interim progress report in 12 months' time.

The FSB report is available here:
http://www.financialstabilityboard.org/publications/r_140722.pdf

Financial Services

FCA Consults on Removal of the Transparency Directive Requirement for Interim Management Statements

On 23 July 2014, the FCA launched proposals to remove the requirement on issuers with listed shares to publish interim management statements. The requirement has been removed by the Transparency Directive Amending Directive (the "TDAD"), which has a 24 month implementation period and will become effective in autumn 2015. The UK Treasury has asked the FCA to remove the requirement to publish interim management statements in autumn 2014, a full year ahead of TDAD implementation. The FCA propose removing several rules from the FCA Handbook entirely as well as amending several other sections. The consultation closes on 4 September 2014.

The consultation paper is available at:
http://www.fca.org.uk/static/documents/consultation-papers/cp14-12.pdf

Judgment Reserved in London Metal Exchange Appeal

On 30 July 2014, judges in the UK Court of Appeal gave a reserved judgment in the London Metal Exchange's ("LME") appeal against United Company Rusal ("Rusal"). The LME had sought to overturn the ruling of the High Court which prevents LME from introducing rules to reduce warehouse queues. LME requested a quick decision, however it is currently unclear whether the panel will make a decision before Friday 1 August 2014 when the courts close for summer recess.

OCC Releases Booklet on Municipal Securities Rulemaking Board Rules

On 24 July 2014, the Office of the Comptroller of the Currency ("OCC") announced the issuance of the "Municipal Securities Rulemaking Board Rules" booklet. The booklet forms part of the Securities Compliance series in the Comptroller's Handbook and consolidates certain guidance regarding the regulation of municipal securities. Among other things, the booklet provides guidance to bank examiners and bankers to aid in evaluation of compliance with Municipal Securities Rulemaking Board ("MSRB") rules and addresses recent updates to the MSRB's rules.

The full text of the OCC MSRB booklet is available at:
http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/pub-ch-sc-msrb.pdf

OCC Releases Guidance on the Risk-Based Supervision Process

On 22 July 2014, the OCC released guidance describing unique characteristics of mutual federal savings associations and the considerations that the OCC uses in its risk-based supervision process. The guidance describes mutual governance structure and mutual members' rights and highlights supervisory considerations in

rating mutuals for each component of the Uniform Financial Institutions Rating System.

The full text of the OCC bulletin is available at: http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-35.html

Funds

EU Council Adopt UCITS V

On 23 July 2014, the Council adopted a Directive ("UCITS V"), which amends the Undertakings for Collective Investment in Transferable Securities ("UCITS") Directive. UCITS V has been drafted to harmonize the approach to depositaries' liabilities (which, under the previous UCITS Directive, varied between member states) by introducing a uniform set of oversight duties which apply regardless of the legal form the UCITS takes. The provisions relating to depositaries are intended to bring the UCITS regime in line with the Alternative Investment Fund Managers Directive, which already imposes similar depositary-related requirements in relation to alternative investment funds.

Under UCITS V, a depositary will have more onerous obligations for custody, including segregation of assets. The new Directive makes it clear that each UCITS may only appoint a single depositary and includes administrative sanctions for any infringement, allowing member states to impose administrative and criminal sanctions for the same infringements.

The Directive also adds the express obligation for UCITS managers to establish and maintain remuneration policies which encourage sound and effective risk management for staff "whose professional activities have a material impact on the risk profiles of the UCITS they manage." These policies should also apply (in a proportionate manner) to any third parties to which the UCITS has delegated investment decisions which influence the funds risk profile.

Although UCITS V has been adopted, it will only enter into force after publication in the Official Journal of the EU. Member states have 18 months from that publication to transpose the Directive into national law and depositaries have a further 24 months after the transposition deadline to comply with the new requirements.

The Council press release is available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/144123.pdf

SEC Adopts Money Market Fund Reform Rules

On 23 July 2014, the Securities and Exchange Commission ("SEC") announced the adoption of structural and operational amendments to the rules that govern money market mutual funds. The new rules require a floating net asset value ("NAV") for institutional prime money market funds, which allows the daily share

prices of these funds to fluctuate along with changes in the market-based value of fund assets. With a floating NAV, institutional prime money market funds must value their portfolio securities using market-based factors and sell and redeem shares based on a floating NAV. Funds may no longer use the special pricing and valuation conventions that presently allow them to maintain a constant share price of $1.00. With liquidity fees and redemption gates, money market fund boards are able to impose fees and gates during periods of stress.

In addition, the rules include enhanced diversification, disclosure and stress testing requirements, as well as updated reporting by money market funds and private funds that operate like money market funds.

The final rules are scheduled to become effective 16 October 2014 and provide for a 2-year transition period.

The full text of the SEC final rules is available at:
http://www.sec.gov/rules/final/2014/33-9616.pdf

Consumer Protection

CFPB Proposes New Rule to Improve Information Regarding Access to Credit in the Mortgage Market

On 24 July 2014, the Consumer Financial Protection Bureau ("CFPB") proposed a rule aimed at improving information reported regarding the residential mortgage market. The rule updates the reporting requirements of the Home Mortgage Disclosure Act ("HMDA") regulations. Among other things, the proposed rule would standardize the reporting threshold that determines which depositary institutions must submit HMDA data and seeks to align HMDA data requirements with established industry standards, including definitions that are already in use in the mortgage market.

Comments on the proposed rule may be made through 22 October 2014.

The full text of the proposed rule is available at:
http://www.consumerfinance.gov/f/201407_cfpb_proposed-rule_home-mortgage-disclosure_regulation-c.pdf

Enforcement

FCA Commences Criminal Proceedings Against Fraudulent FX Trader

On 23 July 2014, FCA announced that it had commenced the criminal prosecution of FX trader Philip Boakes in relation to an unauthorized investment scheme which claimed to carry out FX trading for the benefit of its investors. The scheme operated between 1 October 2004 and 4 June 2013. The prosecution relates to 13 alleged offences including theft, fraud, using a false instrument, being party to the carrying on of a business for a fraudulent purpose and accepting deposits

without authorization or exemption. The first preliminary hearing is scheduled for 5 August 2014 at Southwark Crown Court, London.

The FCA press release is available at: http://www.fca.org.uk/news/fca-commences-criminal-prosecution-against-phillip-boakes

Banker Fined £450,000 as Upper Tribunal Upholds FCA Decision on Market Abuse

On 22 July 2014, the FCA published a Final Notice for former JPMorgan Banker Ian Hannam, after the Upper Tribunal (the "Tribunal") upheld the FCA's decision that Mr. Hannam had engaged in two instances of market abuse via the improper disclosure of inside information. The Tribunal's decision was concerned with whether two emails sent by Mr. Hannam on 9 September and 8 October 2008, containing information about Heritage Oil, fell within the definition of inside information as established by the Financial Services and Markets Act 2000. Mr. Hannam's defence argued that the contents of the emails were too imprecise (and possibly even inaccurate) to constitute insider information.

The FCA's director of Enforcement and Financial crime, Tracey McDermott, described the judgment as "landmark" and stated that "it should leave market participants in no doubt that casual and uncontrolled distribution of inside information is not acceptable in today's markets." The financial penalty of £450,000 issued by the FCA is one of the largest fines issued against an individual in Britain; however, it was recognized that Mr. Hannam's actions were unintentional and he has retained his "fit and proper" status as an approved person.

The FCA's final notice is available at: http://www.fca.org.uk/news/fca-publishes-final-notice-for-ian-hannam

Regulators Take Action Against Lloyds Banking Group for Manipulation and False Reporting of LIBOR

On 28 July 2014, the UK FCA and the US CFTC announced that regulatory action had been taken against Lloyds Banking Group. The FCA fined Lloyds Bank and Bank of Scotland, both part of the Lloyds Banking Group, £105 million for misconduct relating to the Special Liquidity Scheme ("SLS"), the Repo Rate benchmark and the LIBOR. The FCA found that the firms had failed to identify and implement proper controls to manage the risks, breaching the FCA's Fundamental Principles. The FCA levied the larger part of the fine for the misconduct relating to the Repo Rate which the regulator considered to be the more serious of the breaches.

The CFTC issued an order bringing and settling charges against Lloyds Banking Group plc and Lloyds Bank plc for acts of false reporting and attempted manipulation of the LIBOR. The CFTC order requires Lloyds Banking Group and Lloyds Bank to pay a $105 million civil monetary penalty, cease and desist from their violations of the Commodity Exchange Act, and to adhere to specific undertakings to ensure the integrity of LIBOR submissions in the future. In a

related action, the US Department of Justice announced that it had entered into a deferred prosecution agreement with Lloyds Banking Group in exchange for cooperation and the payment of an $86 million penalty.

The FCA final notice is available at: http://www.fca.org.uk/static/documents/final-notices/lloyds-bank-of-scotland.pdf

The CFTC enforcement order is available at: http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enflloydsorderdf072814.pdf

Events

30 July: "Allegations of Discrimination and Retaliation and the CFPB Management Culture" (US House Committee on Financial Services)

31 July: "Examining the GAO Report on Expectations of Government Support for Bank Holding Companies" (US Senate Committee on Banking, Housing & Urban Affairs)

31 July: "Financial Products for Students: Issues and Challenges" (US Senate Committee on Banking, Housing & Urban Affairs)

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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