

ALLEN & OVERY

Key Regulatory Topics: Weekly Update



2 August 2019 – 8 August 2019

BREXIT

Please see our [article](#), 'Can the UK Parliament stop a no-deal Brexit?'

CONDUCT

FCA findings of review into the banking sector's implementation of SMCR

On 5 August, the FCA published the findings of its review into how the SMCR has embedded in the banking sector in the 3 years since it was introduced. Generally, the FCA found that the banking sector has made a concerted effort to implement the regime. Among other things, points of interest include: (i) senior manager accountability – the FCA confirmed that the SMCR does not seek to redefine the roles of non-executives directors, and does not expect them to act more like executive directors. Additionally, many senior managers expressed concern around understanding the meaning of 'reasonable steps' in the context of their business. The FCA comments that the concept of 'reasonable steps' is part of the Duty of Responsibility introduced in the legislation that established the SMCR, and further explains that there is guidance in the FCA's Decision Procedure and Penalties manual that sets out some of the factors that the FCA would expect senior managers to have regard to in considering whether they have taken reasonable steps to avoid a contravention from occurring or continuing; (ii) certification – the FCA notes that firms have broadened their approach to assessment of staff beyond solely technical skills, and managers are better placed to assess the behaviours of their certified staff. However, the majority of firms failed to demonstrate the effectiveness of their assessment approach or how they ensure consistency; and (iii) conduct rules – the FCA notes that many firms were often unable to explain what a conduct breach looked like in the context of their business. The FCA states that it is essential that staff understand the conduct rules and how they apply, as these rules are a critical foundation for firms' culture and the conduct of individuals.

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CONSUMER/RETAIL

EBA opinion on eligibility of deposits, coverage level and co-operation between deposit guarantee schemes

On 8 August, the EBA published an opinion on the eligibility of deposits, coverage level and co-operation between deposit guarantee schemes. The opinion outlines a number of proposals for the EC to consider when preparing a report on the implementation of the Deposit Guarantee Scheme Directive (DGSD), and if and when preparing a proposal for a revised DGSD. The opinion sets out the EBA's proposals on the following topics: (i) home-host cooperation, and cooperation agreements between deposit guarantee schemes; (ii) transfer of contributions, including considerations in relation to third country branches; (iii) DGS' cooperation with various stakeholders; (iv) coverage level; (v) current list of exclusions from eligibility and current provisions on eligibility; (vi) depositor information including information provided to depositors in the

standardised information sheet; and (vii) cooperation between the EBA and the European Systemic Risk Board (ESRB). The EBA will set out further proposals for the EC to consider in two more opinions, to be delivered later in the year.

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FINANCIAL CRIME

SFO issues guidance for corporate cooperation

On 7 August, the SFO published guidance indicating the steps that companies should take if they decide to cooperate with the agency in an investigation, and asks companies to go “above and beyond what the law requires” in order to be “co-operative”. The guidance outlines some indicators of good practice in relation to ‘preserving and providing material’ and ‘witness accounts and waiving privilege’.

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FUND REGULATION

FCA letter on liquidity standards for UCITS

On 7 August, the FCA published a letter (dated 6 August) from Andrew Bailey, Chief Executive of the FCA, to Lord Myners regarding the possibility of the UK establishing its own requirements for liquidity standards for UCITS at higher levels than specified by EU Directives. Mr Bailey states that the UCITS Directive is generally minimum harmonising, meaning that it would be possible to tighten the liquidity standards for UCITS schemes established in the UK. However, Mr Bailey believes that there are two significant drawbacks to this course of action: (i) tightening the liquidity standards for UK funds would not be sufficient to protect UK investors from harm, as the FCA does not have the power to unilaterally extend any such measures to UCITS established in the EEA and marketed in the UK under EU passporting rights; and (ii) the UCITS legislation sets an overall objective that funds should be liquid, however, the detailed rules underlying this may not be sufficient to ensure liquidity. Mr Bailey goes on to say that there is merit in considering the new SEC approach in the US which creates a purposive test of liquid status and supports this with requirements around governance, systems, and controls etc.

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MARKETS AND MARKETS INFRASTRUCTURE

Working Group on Sterling Risk-Free Reference Rates: statement and summary of responses on conventions for referencing SONIA in new contracts

On 7 August, the Working Group on Sterling Risk-Free Reference Rates published a statement regarding conventions for referencing SONIA in new contracts. The statement also includes a summary of responses received from its invitation to feedback set out in its March statement. The statement indicates the Working Group's desired approach of, among other things: (i) aligning bond and loan market conventions with overnight indexed swap conventions; (ii) a 5-day compounding lag period in the SONIA bond market; and (iii) a compounded in arrears approach with a 5-day lag period in the SONIA loan market.

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PENSIONS

EC request for EIOPA technical advice on delegated acts concerning PEPP

On 5 August, the Council of the EU published a cover note, which contains a request from the EC to EIOPA for technical advice (dated 31 July) on possible delegated acts concerning the PEPP Regulation. Certain elements of the Regulation need to be further specified in delegated acts to be adopted by the EC, including: (i) the specification of additional information, with a view to ensuring to the appropriate extent convergence of supervisory reporting; and (ii) criteria and factors to determine when there is a significant PEPP saver protection concern.

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House of Commons Work and Pensions Committee report on pension costs and transparency

On 5 August, the House of Commons Work and Pensions Committee published a report on pension costs and transparency. The report discusses measures to improve the transparency of costs levied by pension funds and asset managers, and makes various recommendations, including: (i) that a 0.75% charge cap should be set on decumulation products available through FCA decumulation pathways from the outset; (ii) that DWP review the level and scope of the charge cap, as well as permitted charging structures, in 2020;

(iii) that the Government bring forward legislation to make the disclosure templates mandatory for both defined contribution and defined benefit schemes; and (iv) that personal State Pension projections be included in the Pensions Dashboard at launch, as they form a key component of many individuals' pension incomes.

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PRUDENTIAL REGULATION

FCA webpage on ETF primary market participation and liquidity resilience during stress events

On 7 August, the FCA published a research note on ETF primary market participation and liquidity resilience during stress events. The note sets out the FCA's initial findings about the level of participation in ETF markets and gives its preliminary analysis of how liquidity providers behave in times of stress. The FCA's key findings include: (i) ETF primary markets are highly concentrated, especially for fixed income ETFs, where concerns about 'liquidity mismatch' are greatest; and (ii) alternative liquidity providers step in during times of market disruption. This analysis is the FCA's first step in investigating the resilience of ETF markets, and further work will combine unique regulatory data from primary markets, secondary markets, and markets for underlying assets to systemically explore the links between ETFs and stability.

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PRA policy statement on regulatory reporting

On 7 August, the PRA published a policy statement on amendments to its regulatory reporting requirements for banks and building societies (PS16/19). These changes are in relation to, inter alia, the PRA reporting templates for ring-fenced banks, statement of profit and loss, and forecast capital data.

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European Systemic Risk Board's (ESRB) decision to postpone certain reports

On 6 August, ESRB decision (ESRB/2019/15) on the postponement of certain reports regarding actions and measures taken pursuant to recommendation ESRB/2014/1 and recommendation ESRB/2015/2 on countercyclical buffer rates and cross-border effects, was published in the OJ. ESRB/2019/15 postpones certain reports on actions and measures taken under ESRB/2014/1 and ESRB/2015/2 to 30 June 2020.

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EBA key recommendations on Basel III reforms

On 5 August, the EBA published its advice to the EC following its assessment of the implementation of Basel III. The advice includes an analysis of the estimated impact based on data from 189 banks and contains a summary of the main policy recommendations to the EC. The EBA's policy recommendations include that: (i) the overall package of revisions to the Basel capital framework agreed upon in December 2017 should be transposed into European legislation in accordance with the implementation calendar set out under that agreement; (ii) the EU legislator should not adopt any EU-specific supporting factors to SME and infrastructure lending exposures when implementing the final Basel III framework; and (iii) newly defined minimum haircut floors framework should be put on hold and more carefully assessed in the context of financial markets regulation.

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EC letter to EBA regarding final elements of the Basel III framework

On 2 August, the EBA published a letter (dated 15 July) from Olivier Guersent, EC Director General of Financial Stability, Financial Services and Capital Markets Union (FISMA), to Jose Campa, EBA Chair, regarding the EBA's call for advice on the final elements of the Basel III framework. Mr Guersent understands that the EBA is currently finalising its advice on the reforms in relation to credit risk, operational risk, output floor, and securities financing transactions. However, he considers that further analysis is required on the following issues: (i) a quantitative assessment of the impacts resulting from the application of the output floor at all levels; (ii) additional analysis to increase the risk sensitivity for specialised lending; and (iii) estimation of TLAC/MREL shortfalls.

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EBA updates single rulebook Q&A tool to accept questions on CRR II, CRD V and BRRD II

On 2 August, the EBA announced that it has updated its single rule book Q&A tool to include CRR II, CRD V and BRRD II. The update means that related questions on the legislation can now be submitted. The interactive single rulebook will be updated in due course.

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RECOVERY AND RESOLUTION

Please see the Prudential Regulation section regarding the EBA's single rulebook update to include BRRD II.

OTHER DEVELOPMENTS

EBA feedback on review of use and implementation of single rulebook Q&A

On 6 August, the EBA published feedback following a review of the use, usefulness and implementation of its single rulebook Q&A. The review was carried out in the second half of 2018 using questionnaires addressed to NCAs and industry representatives. The EBA's findings include, among other things, that: (i) NCAs use regular or ad hoc measures to encourage the use of the Q&A process/tool internally; and (ii) NCAs and institutions are, overall, satisfied with the utility of the Single Rulebook Q&A tool and the answers, but NCAs make important/far-reaching suggestions for improvement, in relation to response times and transparency.

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House of Commons Treasury Committee report on the work of the FCA: the perimeter of regulation

On 2 August, the House of Commons Treasury Committee published its thirty-fifth report of session 2017-19 regarding the work of the FCA and the perimeter of regulation. The Report contains recommendations to the Treasury on the remit and powers of the FCA and draws upon the continuing work of the Treasury Committee in scrutinising the FCA. The Committee makes certain recommendations, including: (i) where regulated financial institutions undertake unregulated activity, that the regulatory system should ensure that clear and explicit warnings are provided at that point, and potential consequences of the lack of regulatory cover are clearly explained, with sanctions for firms that fail to do so; and (ii) that the FCA be given formal power, and necessary remit to be able to formally recommend to the Treasury changes to the perimeter of regulation, where that would enhance its ability to meet its objectives, in particular to prevent consumer harm.

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