SLAUGHTER AND MAY

Financial Regulation Weekly Bulletin

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Major UK and European regulatory developments of interest to banks, insurers and reinsurers, asset managers and other market participants

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If you have any comments or questions, please contact Selmin Hakki.

Slaughter and May also produces a periodical Insurance Newsletter. If you would like to go on the distribution list, please contact Beth Dobson.

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General

1. Financial Conduct Authority

1.1 Coronavirus (COVID-19) - FCA publishes statement – *4 March 2020* - The FCA has published a statement outlining its expectations of firms in light of the coronavirus (COVID-19) outbreak. The FCA is working with HM Treasury and the Bank of England to review the contingency plans of a wide range of firms, undertake assessments of operational risks and monitor the ability of firms to continue to operate effectively, including serving and supporting their customers. The FCA expects firms to take all reasonable steps to meet their regulatory obligations, including staff working from backup sites or home, where necessary.

The FCA will continue engaging with firms, institutions and industry bodies over the coming days and weeks and keep its guidance under review.

Press release: FCA publishes statement on the coronavirus (COVID-19) outbreak

1.2 Our approach to ensuring firms treat vulnerable customers fairly - speech by Nisha Arora, Director of Consumer and Retail Policy at the FCA – *5 March 2020* - Nisha Arora (Director of Consumer and Retail Policy at the FCA) has delivered a speech on the FCA's approach to ensuring the fair and consistent treatment of vulnerable customers across all financial services sectors. In particular, she highlights the importance of protecting vulnerable customers and focuses on the proposals contained within the FCA's July 2019 Guidance Consultation (GC19/3) on the fair treatment of vulnerable customers, which seeks to provide greater clarity on what is required under the FCA's Principles for Businesses.

The FCA intends to refine its Guidance and consult on revised Guidance in Spring 2020, with a view to finalising it later in 2020.

Speech by Nisha Arora (Director of Consumer and Retail Policy at the FCA) on the FCA's approach to ensuring that firms treat vulnerable customers fairly

1.3 FCA Discussion Paper DP20/1 - Transforming culture in financial services: Driving purposeful cultures – *March 2020* – The FCA has published a Discussion Paper (DP20/1) on transforming financial services firms' culture. The Discussion Paper is a collection of essays presenting a range of views from industry leaders, professional bodies and culture experts on how firms can facilitate and drive healthy, purposeful cultures. The press release notes that "*a firm's individual purpose is their own responsibility and, as with culture, the FCA does not prescribe what this should be*". However, the FCA suggests that the following are common elements of a healthy culture:

- a meaningful purpose;
- an inclusive environment where it is safe to speak up;
- effective leadership and governance; and

- employees that have the necessary capabilities and are motivated by appropriate incentives.

FCA Discussion Paper DP20/1 - Transforming culture in financial services: Driving purposeful cultures

Webpage

Press release

1.4 **TechSprints - FCA publishes research report** – *March 2020* - The FCA has published a research report on the evolution of its approach to TechSprints and how it aims to foster innovation through collaboration. TechSprints are typically two-day FCA events which bring together participants from across and outside financial services to develop technology-based ideas and potential solutions to specific industry challenges.

The report covers all aspects of the FCA's approach to TechSprints and identifies the ongoing challenges faced, including its efforts to progress the solutions that emerge from them. The FCA has hosted seven TechSprints relating to areas including pensions, anti-money laundering (AML) and financial crime. It notes that, although it may be difficult to quantify their true value, the TechSprints events are a successful tool to bring about rapid change through cross-industry efforts.

FCA report on the evolution of its approach to TechSprints

Webpage

Please see the **Banking and Finance** section for an item on a letter on board diversity published by the PRA.

Brexit

2. HM Treasury

2.1 **Equivalence in financial services - HM Treasury publishes letter on the UK's preparations for assessments** – *27 February 2020* – HM Treasury has published a letter from Rishi Sunak MP (Chancellor of the Exchequer) to Valdis Dombrovskis (Vice President of the European Commission) on the UK's preparations for assessments of equivalence in the area of financial services. In particular, he states that:

- both parties have agreed to start assessing equivalence under their respective frameworks;
- the UK is committed to concluding equivalence assessments before the end of June 2020 and he sees no reason why the assessments cannot be carried out within this timeframe, albeit that the EU's negotiating mandate does not include a date;
- in order for both parties to progress their equivalence assessments, there should be an exchange of information to support autonomous decision-making on equivalence assessments; and

- at the end of the transition period, the UK and EU will start from a position of regulatory alignment.

Letter from Rishi Sunak MP (Chancellor of the Exchequer) to Valdis Dombrovskis (Vice President of the European Commission) on the UK's preparations for equivalence assessment in the area of financial services

Webpage

3. Prudential Regulation Authority

3.1 EU liabilities and service continuity - PRA publishes letter to insurance firms on contingency plans – *28 February 2020* - The PRA has published a letter from Anna Sweeney (Executive Director of Insurance Supervision at the PRA) to PRA-regulated insurance firms regarding their contingency plans for maintaining service continuity in respect of EU liabilities post-Brexit. In particular, the letter states that:

- firms intending to rely on EU run-off regimes, as a temporary or permanent solution to ensure service continuity, should undertake a thorough analysis of their expected run-off profile and proactively discuss their proposed approach with the relevant EU authorities; and

- firms seeking to transfer their EU liabilities to an EU-authorised insurer should be aware that there is no guarantee that any Part VII FSMA 2000 transfer will be sanctioned by the court or that, if it is sanctioned, it will be within firms' intended timeframes. Therefore, the PRA states that firms should proactively discuss their proposed approach with the relevant EU authorities to ensure that their contingency plans, and any associated risks, remain satisfactory to them.

The PRA reminds firms to consider relevant legal advice when finalising contingency plans and requests that they confirm, by 30 April 2020, that they have engaged with all relevant EU authorities on the issues contained in its letter.

Letter from Anna Sweeney (Executive Director of Insurance Supervision at the PRA) to insurance firms on contingency plans for maintaining service continuity in respect of outstanding EU liabilities post-Brexit

Banking and Finance

4. Basel Committee

4.1 Benchmark rate reforms - Basel Committee publishes newsletter – *27 February 2020* - The Basel Committee on Banking Supervision has published a newsletter on benchmark rate reforms. The newsletter considers the recent global efforts to strengthen the robustness and reliability of existing interbank offered rates (IBORs) and promote the development of alternative reference rates, before assessing the effects of benchmark rate reforms on banks' businesses and examining the steps they should take to prepare for transitioning to alternative rates. In particular, the newsletter states that:

- market participants should maintain close dialogue with their supervisors on their plans and progress for transitioning to alternative rates;

- as the London interbank offered rate (LIBOR) is expected to cease after the end of 2021, market participants should consider the economic, legal and reputational risks associated with continuing to write new contracts based on LIBOR;
- where banks continue to use existing IBORs, contracts should include provisions determining how the replacement of a discontinued reference rate will be handled and systems should be adapted to accommodate alternative reference rates;
- under the Basel framework, amendments to contractual terms in capital instruments, solely for the purposes of implementing benchmark rate reforms, will not result in them being treated as new instruments for the purpose of assessing the minimum maturity and call date requirements, or affect their eligibility under the Basel III transitional arrangements; and
- banks should consider adjusting their risk management frameworks to reflect transitions to alternative rates and banks that use internal models for regulatory capital purposes should consider how they will adapt those models.

The Basel Committee states that banks should expect greater supervisory scrutiny of their preparations and contingency planning to ensure a smooth and timely transition.

Basel Committee newsletter on benchmark rate reforms and their impact on banks

4.2 **Policy and supervisory initiatives - discussed by Basel Committee at 26-27 February meeting** – *27 February 2020* - The Basel Committee on Banking Supervision has published a summary of the discussions at its meeting of 26-27 February 2020, during which it addressed several topics, including:

- the financial stability implications of the coronavirus (COVID-19) outbreak for the banking system and the business continuity measures that institutions and authorities have implemented to mitigate such implications;
- the vulnerabilities associated with leveraged loans and collateralised loan obligations;
- the progress made by banks to prepare for the transition from LIBOR to alternative reference rates;
- the establishment of a high-level task force on climate-related financial risks; and
- the implementation of the Basel III framework across its member jurisdictions, including its plans to publish, in March 2020, a consultation on strengthening banks' operational resilience and a report on members' experiences of using the countercyclical capital buffer.

Press release: Basel Committee announces policy and supervisory initiatives discussed at its meeting on 26-27 February 2020

5. European Banking Authority

5.1 **Mortgage Credit Directive - EBA publishes review of the RTS on professional indemnity insurance for mortgage credit intermediaries** – *February 2020* - The European Banking Authority

(EBA) has published a report on its review of the regulatory technical standards (RTS) specifying the minimum monetary amount of professional indemnity insurance (PII) or comparable guarantee to be held by mortgage credit intermediaries under the Mortgage Credit Directive (2014/17/EU).

The report concludes that there is currently no evidence to suggest that the minimum monetary amounts of PII or comparable guarantees should be amended. However, the EBA stresses that its mandate did not extend to assessing: (i) the extent to which the usage of the minimum payout amounts prescribed in the RTS are potentially impeded by specific clauses in PII contracts; (ii) the nature of the comparable guarantees that may be used in the market; or (iii) what should be understood as a "*comparable guarantee*".

EBA report on the review of the RTS on PII for mortgage credit intermediaries under the Mortgage Credit Directive

Press release

5.2 **CRR - EBA publishes report on institutions' Pillar 3 disclosures** – *March 2020* - The EBA has published a report assessing institutions' Pillar 3 disclosures under the Capital Requirements Regulation (575/2013/EU) (CRR). The report aims to assess institutions' compliance with the Pillar 3 disclosure requirements, identify best practices and potential areas for improvement. The EBA states that Pillar 3 disclosures play a key role in promoting market discipline through the public reporting of meaningful prudential information.

The report states that institutions are making good progress overall, particularly in relation to matters including environmental, social and governance (ESG) and sustainability disclosures. However, the EBA also observed practices which may impair the proper communication of their risk profiles, including: (i) the omission of information with no explanation; (ii) a lack of clarity as to the location and identity of Pillar 3 reports, hindering the ability of users to locate them; (iii) a lack of consistency in the structure of Pillar 3 reports and the information contained within them; (iv) the oversimplification of interim reports compared to end-of-year reports; and (v) a lack of reconciliation of quantitative information across disclosure templates and inconsistent methods to calculate such information.

EBA report on the assessment of institutions' Pillar 3 disclosures under the CRR

EBA Pillar 3 framework strategy

Press release

5.3 **Basel III reforms - EBA publishes responses to the Commission's call for technical advice on revisions to the own fund requirements for credit, operational, market and credit valuation adjustment risk** – *February and March 2020* – The EBA has published a letter, dated 25 February 2020, from José Manuel Campa (Chairperson of the EBA) to John Berrigan (Director General (acting) for Financial Stability, Financial Services and the Capital Markets Union at the European Commission) containing its analysis in response to the European Commission's call for additional technical advice on the implementation of Basel III reforms, which was published in July 2019.

The letter contains the EBA's additional analysis on:

- specialised lending, minimum requirements for own funds and eligible liabilities (MREL), intra-group equity exposures and the application of the output floor; and

- the impact of Basel III reforms on MREL.

A separate letter, dated 5 March 2020, has also been published, containing the EBA's additional analysis on the application of the output floor and increased risk sensitivity in the equity exposure class. It concludes that:

- the impact of applying the output floor at the individual level does not seem to be particularly high, except for co-operative banks; and
- the impact of the implementation of the Basel III framework to equity exposures at the individual and sub-consolidated level has a significantly higher impact than at consolidated level and it is mainly driven by intra-group equity exposures.

EBA response dated 25 February to Commission's call for additional technical advice on the implementation of Basel III reforms

Annex 1: Specialised lending, MREL, intra-group equity exposures and the application of the output floor

Annex 2: Impact of Basel III reforms on MREL

EBA response dated 5 March to Commission's call for additional technical advice with additional analysis on the application of the output floor and increased risk sensitivity in the equity exposure class

5.4 Digital finance: Towards a common EU approach - speech by José Manuel Campa, Chairperson of the EBA – *3 March 2020* – José Manuel Campa (Chairperson of the EBA) has delivered a speech on the adoption of financial technology and the EBA's digital finance priorities for 2020. Among other things, Mr Campa notes the EBA's recent completion of its deliverables under the European Commission's FinTech Action Plan and its FinTech Roadmap, published in March 2018, and highlights a need to promote a common EU approach towards the application of financial technology and digital finance. The EBA's digital finance strategic priorities for 2020 include an assessment of how banking regulators and supervisors can leverage technology in their own processes and analysis of how new technologies could be used by market participants to address regulatory and compliance requirements more effectively and efficiently.

Speech by José Manuel Campa (Chairperson of the EBA) on the EBA's digital finance priorities for 2020

6. European Central Bank

6.1 Regulation on Payment Statistics - ECB publishes consultation on amending draft Regulation – *February 2020* – The European Central Bank (ECB) has published a draft Regulation amending the ECB Regulation on Payment Statistics (ECB/2013/43) for public consultation. The consultation forms part of the ECB's review into payment statistics with the aim of ensuring that they remain fit for purpose. The ECB states that payment statistics help to identify trends in payments, provide an overview of the EU payments landscape and support the policy decisions of the European System of Central Banks.

In particular, the draft Regulation introduces new requirements for reporting information on innovative payment services and channels, payment schemes, fraudulent payment transactions and statistical information on card payments.

The consultation period closes on 9 April 2020.

ECB draft Regulation amending its Regulation on Payment Statistics

Press release

7. Prudential Regulation Authority

7.1 **PRA Consultation Paper CP2/20 - Pillar 2A: Reconciling capital requirements and macroprudential buffers** – *February 2020* - The PRA has published a Consultation Paper (CP2/20) setting out its proposals to update the Pillar 2A capital framework to take into account the additional resilience associated with higher macroprudential buffer requirements in a standard risk environment. This follows the Financial Policy Committee's decision in December 2019 to increase the UK countercyclical capital buffer (CCyB) rate that it expects to set in a standard risk environment from approximately 1% to approximately 2%.

The PRA also proposes to amend Supervisory Statement (SS)31/15 'The Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP)' to clarify the macroprudential considerations it takes into account when assessing the level of capital required to ensure the sound management and coverage of firms' risks.

The consultation period closes on 30 April 2020. The PRA proposes to implement the policy changes on 6 July 2020 and apply the Pillar 2A reduction, where applicable, at the same time or before the increased countercyclical capital buffer rate comes into effect on 16 December 2020.

PRA Consultation Paper CP2/20 - Pillar 2A: Reconciling capital requirements and macroprudential buffers

Webpage

7.2 **PRA Policy Statement PS4/20 - Liquidity: The PRA's approach to supervising liquidity and funding risks** – *March 2020* - The PRA has published a Policy Statement (PS4/20) and updated SS24/15 'The PRA's approach to supervising liquidity and funding risk', which sets out its final policy on its proposals to update its approach to supervising liquidity and funding risks, in light of changes made to the Bank of England's Market Operations Guide. This follows the PRA's consultation (CP27/19) on the matter, which was published in October 2019.

The PRA confirms that it will proceed with its proposals, as consulted on, including that:

- there should be no presumptive order in which firms should use the Bank's liquidity facilities or draw down their own liquid asset buffers to meet a liquidity need; and
- where firms view central bank liquidity facilities as part of their liquidity risk management strategy, the PRA expects this to be included as part of the credible recovery options outlined in firms' recovery plans.

The PRA states that it will align supervisory practice with the new policies in SS24/15 and the Bank's Market Operations Guide. The updated SS24/15 comes into effect immediately.

PRA Policy Statement PS4/20 - Liquidity: The PRA's approach to supervising liquidity and funding risks

Webpage

Updated Supervisory Statement SS24/15 'The PRA's approach to supervising liquidity and funding risk'

Webpage

7.3 **Board diversity - PRA publishes letter on firms' compliance** – *March 2020* – The PRA has published a letter to PRA-regulated firms, reinforcing the importance the PRA places on board diversity and reminding firms of the need to comply with PRA rules in this area. The PRA requires firms to have a board diversity policy and expects boards to have the diversity of experience and capacity to provide effective challenge across the full range of the firm's business. The PRA welcomes the publication of the EBA's February 2020 report on the benchmarking of diversity practices which illustrated that 70% of the sampled UK credit institutions and investment firms had a policy in place promoting diversity in management bodies.

PRA letter on firms' compliance with board diversity requirements

8. Payment Systems Regulator

8.1 **Review of PSR Directions issued under the Financial Services (Banking Reform) Act 2013 - PSR publishes revised General Directions and Specific Direction 1** – *March 2020* - The Payment Systems Regulator (PSR) has published revised versions of its General Directions and Specific Direction 1, following its March 2019 consultation (CP19/3) on the draft text of the amended Directions. The Directions, which seek to improve access to, and the governance of, payment systems in the UK, were amended to ensure that they remain relevant, proportionate and fit for purpose.

The revised General Directions 1 to 5 come into force on 5 April 2020, while the revised Specific Direction 1 will come into force on 5 May 2020.

PSR Response Paper RP20/1: Response to CP19/3

Factsheet

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Press release

9. European Payments Council

9.1 **SEPA payment scheme rulebooks - EPC publishes updated versions** – *5 March 2020* – The European Payments Council (EPC) has published updated versions of the following 2019 Single European Payments Area (SEPA) payment scheme rulebooks: (i) the SEPA Credit Transfer (SCT) scheme; (ii) the SEPA Instant Credit Transfer (SCT Inst) scheme; (iii) the SEPA Direct Debit Core (SDD Core) scheme; and (iv) the SDD Business-to-Business (SDD B2B) scheme. The updated versions

of the 2019 SEPA payment scheme rulebook will come into force from 1 April 2020 to 21 November 2021.

The EPC has also published an updated version of its document which sets out the maximum amount for instructions under the SCT Inst scheme rulebook.

Maximum amount for instructions under the 2019 SEPA Instant Credit Transfer scheme rulebook

Webpage

Press release

9.2 **SEPA Proxy Lookup scheme rulebook - EPC publishes updated version** – *5 March 2020* - The EPC has published an updated version of its SEPA Proxy Lookup scheme rulebook. The updated version includes amendments relating to: (i) the email address and reachability check as optional features in the SEPA Proxy Lookup scheme; (ii) the specification of a maximum liability amount equal to the fee paid to the Responding Registry Provider (RRP) for the provision of the data; and (iii) the possibility for a SEPA Proxy Lookup scheme participant in its role as an RRP to charge a fee in exchange of services received by the Initiating Registry Provider (IRP).

The rulebook will come into effect on 1 June 2020.

Updated SEPA Proxy Lookup scheme rulebook

Webpage

Press release

10. UK Finance

10.1 **Authorised Push Payment Scams Voluntary Code - signatories to continue funding until the end of December 2020** – *27 February 2020* - The seven signatories to the authorised push payment (APP) Scams Voluntary Code, which launched in May 2019, have agreed to continue providing interim funding for the reimbursement of 'no blame' victims of APP fraud until at least 31 December 2020. The interim funding deadline was due to expire on 31 March 2020. The seven signatories have agreed to extend the deadline in order to allow themselves, the industry, regulators and the government more time to consider alternative recommendations for the long-term arrangements for such funding.

Press release: Signatories to the APP Scams Voluntary Code to continue interim funding until 31 December 2020

11. Recent Cases

11.1 ***Case C-125/18 Gómez del Moral Guasch v Bankia SA***, 3 March 2020

Unfair terms in consumer contracts - mortgage loan agreement - variable interest rates indexed to a national official reference rate - interpretation of the Unfair Contract Terms Directive (93/13/ECC)

The European Court of Justice (Grand Chamber) (ECJ) has given a preliminary ruling on the interpretation of Articles 1(2), 4(2), 6(1), 7(1) and 8 of the Unfair Contract Terms Directive (93/13/ECC) (UCTD) relating to a potentially unfair term in a mortgage loan agreement, concerning the indexing of the variable ordinary and remunerative interest rate to Spain's mortgage loan reference index, Índice de Referencia de Préstamos Hipotecarios (IRPH).

Among other things, the ECJ held that the use of a reference rate permitted under Spanish law did not take the relevant interest provision out of scope for the UCTD because use of the rate was not mandatory. The ECJ also concluded that it is up to the national court to determine whether a contractual term is "*plain and intelligible*" for UCTD purposes; that requirement means that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is in a position to understand the specific functioning of the method used for calculating the interest rate and thus evaluate the potentially significant economic consequences of such a term on his or her financial obligations. It was relevant in this case that essential information relating to the method of calculation of the rate was easily accessible and that all credit institutions were required to provide consumers with historic data about the rate's fluctuations.

Case C-125/18 Gómez del Moral Guasch v Bankia SA

11.2 ***Murphy, Campbell, Teale and Barness v Ingenious Media Ltd, Coutts & Co and National Westminster Bank plc***, appeal against [2019] EWHC 3299 (Ch), 10 December 2019

Negligence - banks' duty of care to advise on the prudence of a transaction – packaged investment products – independent financial advisors – vicarious liability – permission to appeal granted

The Court of Appeal has updated its civil appeals case tracker to indicate that, on 27 February 2020, permission to appeal was granted in this case. The case concerned the vicarious liability of the relevant banks for breaches of duty by the investors' independent financial advisors. As previously reported in this Bulletin, the High Court struck out contractual and tortious claims and granted summary judgment against the claimants (investors in a film finance tax avoidance scheme) in respect of the vicarious liability claims.

Court of Appeal case tracker: Permission to appeal granted in Barness v Ingenious Media Ltd

Barness v Ingenious Media Ltd [2019] EWHC 3299 (Ch)

Securities and Markets

12. European Securities and Markets Authority

12.1 **MiFID II/MiFIR – ESMA updates annual transparency calculations for equity and equity-like instruments** – *28 February 2020* - The European Securities and Markets Authority (ESMA) has updated its annual transparency calculations for equity and equity-like instruments under the Markets in Financial Instruments Directive (2014/65/EU) (MiFID II) and the Markets in Financial Instruments Regulation (600/2014/EU) (MiFIR). The updated calculations will apply from 1 April 2020 until 31 March 2021.

Press release: ESMA updates annual transparency calculations for equity and equity-like instruments under MiFID II/MiFIR

12.2 **MiFID II/EMIR - ESMA publishes report on C6 energy derivative contracts** – *March 2020* - ESMA has published a report, dated 29 January 2020, on whether C6 energy derivative contracts should be subject to certain obligations under the European Market Infrastructure Regulation (648/2012/EU) (EMIR), for which they currently benefit from a temporary exemption under the MiFID II until 3 January 2021.

The report focuses on the impact, cost, adequacy and feasibility of requiring C6 energy derivative contracts to be subject to certain EMIR obligations, including: (i) the clearing obligation under Article 4 EMIR; (ii) the risk mitigation techniques under Article 11(3) EMIR; and (iii) calculations for the clearing threshold under Article 10 EMIR. ESMA concludes that, in light of the current context of uncertainty given the UK's withdrawal from the EU, where an important share of the C6 energy derivatives contracts are either traded or cleared, it would be prudent to wait before considering a change to the temporary regime for C6 energy derivative contracts.

The report will inform the European Commission's report on the assessment of, and whether to maintain, the temporary regime for C6 energy derivative contracts under MiFID II.

ESMA report on the temporary regime for C6 energy derivative contracts under MiFID II and the application of EMIR obligations

ESMA letter on the report to the European Commission

Press release

12.3 **MMF Regulation - ESMA publishes official translations of Guidelines on stress testing scenarios** – *3 March 2020* - ESMA has published official translations of its Guidelines on stress testing scenarios under the Money Market Funds Regulation (EU) 2017/1131 (MMF Regulation).

ESMA Guidelines on stress testing scenarios under the MMF Regulation

Webpage

Press release

13. International Capital Market Association

13.1 **Transition to risk-free rates in international bond markets - ICMA publishes guide** – *27 February 2020* - The International Capital Market Association (ICMA) has published a guide on the transition to risk-free rates in international bond markets. The guide aims to highlight the transition progress made in relation to specific products, including floating rate notes, covered bonds, capital securities, securitisations and structured products.

ICMA guide on the transition to risk-free rates in international bond markets

Webpage

Press release

14. International Securities Lending Association

14.1 **Principles for Sustainable Securities Lending - published by ISLA Council for Sustainable Finance** – *February 2020* - The International Securities Lending Association (ISLA) Council for

Sustainable Finance, following its formation in January 2020, has recently published its Principles for Sustainable Securities Lending. The Principles provide a voluntary mechanism which aims to increase the sustainability of securities financing and covers several areas, including: (i) alignment; (ii) transparency; (iii) tax; (iv) voting rights; (v) collateral; (vi) short selling; (vii) stakeholder involvement; and (viii) innovation.

The ISLA Council for Sustainable Finance also invites stakeholders to complete a survey, the results of which are intended to inform discussions at a roundtable event which will be held as part of the ISLA Council for Sustainable Finance's official launch.

ISLA Council for Sustainable Finance Principles for Sustainable Securities Lending

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Survey

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Press release

15. International Capital Market Association

15.1 CSDR - ICMA publishes FAQs on mandatory buy-ins and non-cleared SFTs – *March 2020* – ICMA has published a series of FAQs on mandatory buy-ins and non-cleared securities financing transactions (SFTs) under the Central Securities Depository Regulation (909/2014/EU) (CSDR). The FAQs aim to clarify the application of CSDR buy-ins in the case of repurchase agreements and other SFTs and will be updated in light of new regulatory guidance and agreed market best practice.

ICMA FAQs on mandatory buy-ins and non-cleared SFTs under the CSDR

Press release

Asset Management

16. Financial Conduct Authority

16.1 FCA Feedback Statement FS20/2: Patient Capital and Authorised Funds – *February 2020* - The FCA has published a Feedback Statement (FS20/2) setting out its findings on the existence of unnecessary barriers to investing in patient capital through UK-authorised funds. The FCA defines 'patient capital' as including a broad range of alternative, and often illiquid, investment assets intended to deliver long-term returns, including venture capital, real estate, corporate loans and infrastructure. This follows the FCA's Discussion Paper (DP18/10) on patient capital and authorised funds, published in December 2018.

The FCA confirms it found no inappropriate barriers to investing in patient capital within its authorised funds regime for professional and sophisticated retail investors and, although it found barriers which limited the range of available investment options for broad retail distribution funds, these barriers are either necessary or cannot be relaxed without introducing an inappropriate degree of risk for retail investors.

The FCA also sets out its initial response to the Investment Association's proposal for a new type of authorised fund designed to invest in long-term assets, confirms that it is currently examining the rules relating to authorised funds holding illiquid assets and states that it will consider any rule changes recommended by the Financial Policy Committee (FPC) following the conclusion of the FPC's review of fund liquidity issues.

FCA Feedback Statement FS20/2: Patient Capital and Authorised Funds

Webpage

16.2 FCA Policy Statement PS20/4: Amendment of COBS 21.3 permitted links rules – *March 2020* - The FCA has published a Policy Statement (PS20/4) with its final policy on proposals to amend the permitted links rules in its Conduct of Business sourcebook (COBS) 21.3 to remove "*unjustified barriers to retail investors investing in a broader range of long-term assets in unit-linked funds, while maintaining an appropriate degree of investor protection*". This follows the FCA's Consultation Paper (CP18/40) published in December 2018.

The FCA confirms that it will proceed with its proposals, largely as consulted on, including:

- providing additional conditional permitted links categories which supplement the existing range of permitted links (for example, a new 'conditional permitted immovable' category) for insurers that are able to meet certain conditions which provide an enhanced degree of investor protection;
- setting a new limit requiring that overall investments in illiquid assets in a linked fund should comprise no more than 35% of total assets for firms meeting the new conditions;
- ensuring firms provide appropriate risk warnings to help consumers understand the investment and liquidity risks involved; and
- retaining the existing limits relating to investment in land and property and clarifies that these investments will not be included in the overall 35% limit.

The use of these extended permissions is conditional on insurers: (i) ensuring that the investments are suitable and appropriate for a policyholder's circumstances, including that the timing of benefits due to a policyholder are not negatively affected by liquidity issues; and (ii) setting out clear and prominent information to policyholders on the additional risks and consequences involved.

For firms wishing to make use of the new conditional permitted links, the new rules will come into force on 4 March 2020.

FCA Policy Statement PS20/4: Amendment of COBS 21.3 permitted links rules

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Insurance

17. International Association of Insurance Supervisors

17.1 **Implementation of TCFD recommendations - IAIS and SIF publish issues paper** – *February 2020* - The International Association of Insurance Supervisors (IAIS) and the Sustainable Insurance Forum (SIF) have published an issues paper on the implementation of the recommendations of the Financial Stability Board (FSB) Task Force on Climate-related Financial Disclosures (TCFD), which were published in June 2017.

The issues paper provides an overview of the supervisory practices considered in the development of climate-related disclosure requirements within twelve different jurisdictions and focuses on practices that could be implemented with limited direct regulatory intervention. Although the paper is not intended to create supervisory expectations, it notes that the speed at which supervisory practices relating to climate risk are evolving reflects the need to consider supervisory responses at a global level, including the development of specific Insurance Core Principles (ICPs).

The IAIS and SIF intend to publish an application paper on climate risk in the insurance sector, which is expected to include a section on disclosures.

IAIS and SIF issues paper on the implementation of TCFD recommendations

18. European Insurance and Occupational Pensions Authority

18.1 **Cyber underwriting: Managing the risks of digital finance - speech by Fausto Parente, Executive Director of EIOPA** – *3 March 2020* - Fausto Parente (Executive Director of the European Insurance and Occupational Pensions Authority (EIOPA)) has delivered a speech on managing the risks of digital finance and strengthening insurers' cyber resilience. Among other things, he discusses EIOPA's progress regarding the development of principles of digital responsibility in insurance based on fairness and non-discrimination, transparency and explainability, and governance. He also encourages market participants and stakeholders to work together with EIOPA to strengthen cyber resilience by developing, among other things, a standardised cyber reporting framework and appropriate cyber underwriting standards.

Speech by Fausto Parente (Executive Director of EIOPA) on managing the risks of digital finance and strengthening cyber resilience

19. Financial Conduct Authority

19.1 **Outsourcing in the life insurance sector - FCA publishes findings of multi-firm review** – *4 March 2020* - The FCA has published the findings of its multi-firm review of firms' outsourcing arrangements and third-party service providers in the life insurance sector. The FCA explains that outsourcing is a widespread practice in the life insurance sector, with many firms relying on a limited number of service providers, which creates a concentration risk and the potential for widespread and significant consumer harm if outsourced activities go wrong or if an outsourced service provider fails.

The FCA's review included assessing a sample of life insurers' systems and controls for managing outsourced activities and included a desk-based review of firms' supervisory arrangements in three areas classified as presenting a risk of material consumer harm: (i) outsourcing exit planning; (ii) business continuity planning; and (iii) governance, systems and controls. While the

FCA observed good practice generally (particularly in relation to the implementation of extensive governance and systems and controls over outsourced activities) and did not find evidence of widespread failure, it observed specific shortcomings in some firms' identification and management of operational risks in outsourcing arrangements.

The FCA encourages all life insurance firms to consider the findings of its report, including examples of good and bad practice, review their systems and controls accordingly and take prompt remedial action in response to any identified shortcomings. The FCA is not proposing any new rules or guidance in this area at this time.

FCA multi-firm review of outsourcing arrangements in the life insurance sector

Please see the **Brexit** section for an item on the PRA publishing a letter to regulated insurance firms regarding their contingency plans for maintaining service continuity in respect of EU liabilities post-Brexit.

Please see the **Asset Management** section for an item on FCA Policy Statement PS20/4: Amendment of COBS 21.3 permitted links rules.

Enforcement

20. Serious Fraud Office

20.1 Conspiracy to commit fraud and unlawful financial assistance - three former bank executives acquitted – *February 2020* – The Serious Fraud Office (SFO) has announced that three former executives of Barclays Bank have been acquitted of conspiracy to commit fraud, fraud by false representation and unlawful financial assistance, contrary to section 1(1) of the Criminal Law Act 1977, section 1 of the Fraud Act 2006 and section 151 of the Companies Act 1985 respectively.

In 2008, the SFO charged Roger Jenkins, Richard Boath and Thomas Kalaris with the offences set out above in relation to alleged misconduct during the period between 1 October and 30 November 2008 in respect of capital raising arrangements between Barclays Bank plc, Qatar Holding LLC and Challenger Universal Ltd.

SFO webpage on Barclays Bank v Qatar Holding LLC

Press release

21. Recent cases

21.1 ***The Serious Fraud Office v Barclays Plc and another***, [2018] EWHC 3055 (QB), 12 November 2018

Application to prefer a voluntary bill of indictment – corporate criminal liability for the alleged criminal conduct of senior officers - section 2(2)(b) Administration of Justice (Miscellaneous Provisions) Act 1933 – application dismissed

The High Court has dismissed an application by the SFO to bring a voluntary bill of indictment against Barclays Plc and Barclays Bank Plc. The application follows the dismissal, at Southwark Crown Court in May 2018, of all charges against the banks in respect of criminal proceedings relating to alleged misconduct in connection with capital raising arrangements between Barclays Bank plc, Qatar Holding LLC and Challenger Universal Ltd during the 2008 financial crisis. A voluntary bill of indictment, governed by section 2(2)(b) of the Administration of Justice

(Miscellaneous Provisions) Act 1933 and Part IV of the Consolidated Criminal Practice Direction, enables the prosecution to apply to the High Court to obtain an indictment against a defendant where the Crown Court has dismissed such charges before trial.

The application involved a consideration of whether the alleged criminal dishonesty of senior officers (now acquitted, see the item immediately above) within a corporate organisation can be attributed to that corporation so as to render the corporation itself criminally liable. Dismissing the application, Davis LJ concluded that the individual defendants were not the "*directing mind and will*" of the corporation for the purpose of performing the function in question and therefore their alleged criminal conduct could not be attributed to the banks.

Reporting restrictions on this case were lifted on 28 February 2020.

The Serious Fraud Office v Barclays Plc and another [2018] EWHC 3055 (QBD)

This Bulletin is prepared by the Financial Regulation Group of Slaughter and May in London. The Group comprises a team of lawyers with expertise and experience across all sectors in which financial institutions operate.

We advise on regulatory issues affecting firms across the financial services sector, including banks, investment firms, insurers and reinsurers, brokers, asset managers and funds, non-bank lenders, payment service providers, e-money issuers, exchanges and clearing systems. We also advise non-regulated businesses involved in financial regulatory matters. In addition, our leading financial regulatory investigations practice is regularly instructed by financial institutions requiring specialist knowledge of financial services regulation together with experience in high profile and complex investigations and contentious regulatory matters.

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Our Financial Regulation Group also produces occasional briefing papers and other client publications. The five most recent issues of this Bulletin and our most recent briefing papers and client publications appear on the Slaughter and May website **here**.

The Group's recent work includes advising:

- A number of global banks, insurance and asset management groups on their preparations for Brexit;
- A number of banking groups in relation to banking structural reform, including the UK ring-fencing regime;
- Prudential plc on the proposed demerger of its UK & Europe business (M&G Prudential) from Prudential plc, resulting in two separately-listed companies;
- Standard Life plc on the recommended all-share merger with Aberdeen Asset Management and the subsequent sale by Standard Life Aberdeen plc of its capital-intensive insurance business to Phoenix;
- UK Asset Resolution and Bradford & Bingley plc in relation to the disposal of legacy buy-to-let mortgage assets to Prudential plc and funds managed by Blackstone for a total consideration of £11.8bn;
- On the legal implications of developments across a broad Fintech waterfront for clients such as Euroclear, TreasurySpring, Bupa, TrueLayer, WorldRemit and Stripe, as well as other established businesses, challengers and start-ups; and
- A number of multi-national clients in relation to the UK, EU, and US economic and trade sanctions regimes.

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