

DUE TO THE INDEPENDENCE DAY HOLIDAY, CORPORATE & FINANCIAL WEEKLY DIGEST WILL NOT BE PUBLISHED ON JULY 6. THE NEXT ISSUE WILL BE DISTRIBUTED ON JULY 13.

BROKER-DEALER

SEC and CFTC Approve New MOU

On June 28, the Securities and Exchange Commission and Commodity Futures Trading Commission announced the approval of a new Memorandum of Understanding (MOU) aimed at ensuring continued information sharing between the agencies. The MOU updates and enhances a 2008 MOU between the agencies by adding various elements that reflect current market conditions. For example, the MOU addresses the regulatory regimes for swaps and security-based swaps. The agencies acknowledged that despite their approval of the MOU, they intend to continue cooperating primarily via informal consultations and meetings.

The press release announcing the MOU is available [here](#).

SEC Proposes New Approval Process for Certain ETFs

On June 28, the Securities and Exchange Commission voted to propose a new rule and set of form amendments related to the approval process for certain exchange-traded funds (ETFs) that operate as open-ended funds (Proposal). Among other things, the Proposal calls for the creation of a new rule 6c-11 of the Investment Company Act of 1940 (Investment Company Act) that would allow ETFs that satisfy certain conditions to operate within the scope of the Investment Company Act and to come to market without applying for individual exemptive orders. Such proposed conditions include, but are not limited to, an ETF being required to provide daily portfolio transparency and historical information regarding premium discounts and bid-ask spreads on its website. The Proposal also calls for amendments to Form N-1A (the form used for purposes of registering ETFs structured as open-ended funds) and Form N-8B-2 (the form used for purposes of registering ETFs structured as unit investment trusts) to provide additional ETF-specific information that can be used by investors. The comment period for the Proposal will be open for 60 days after its publication in the *Federal Register*.

The press release announcing the Proposal is available [here](#).

DERIVATIVES

See “European Commission Confirms MiFID II Ancillary Exemption Test on An Entity-By-Entity Basis” in the *Brexit/EU Developments* section.

BREXIT/UK DEVELOPMENTS

FCA Publishes Statement on Its Brexit Preparations

On June 26, the UK Financial Conduct Authority (FCA) published a statement updating stakeholders on its preparations for the United Kingdom’s withdrawal from the European Union (Brexit). The FCA’s statement noted

HM Treasury's preparations for Brexit, which were then published in HM Treasury's own press release, dated June 27.

The FCA continues to prepare for a range of scenarios, including a "no deal" Brexit in which there would be no transition period after March 29, 2019. Under HM Treasury's plans, the FCA will amend and maintain existing EU-binding technical standards into UK law following Brexit.

According to the FCA's statement, it also plans to amend the FCA Handbook to ensure consistency with the UK government's transposition of EU law and regulations in the run up to March 2019, reducing changes to the FCA Handbook that are unrelated to Brexit.

This fall, the FCA anticipates consulting on its changes relating to Brexit, as well as regarding the rules which will apply to firms during any temporary permissions regime.

The FCA's statement is available [here](#).

HM Treasury's press release is available [here](#).

BREXIT/EU DEVELOPMENTS

EBA Publishes Opinion on Firms' "Inadequate" Brexit Preparations

On June 25, the European Banking Authority (EBA) published an opinion on preparations for the withdrawal of the United Kingdom from the European Union (Brexit). Its opinion cites two aims with respect to national competent authorities:

1. ensuring that financial institutions are adequately considering the risks of a possible Brexit without a ratified withdrawal agreement, and that they are putting in place appropriate plans to mitigate risks in an appropriate timeframe; and
2. drawing attention to the customer protection obligations of financial institutions in these circumstances.

The EBA identifies the following as factors that influenced its decision to issue the opinion at this time:

1. inadequate progress in financial institutions' preparations for a "no deal" Brexit;
2. the absence of any legal certainty around the politically agreed transition period;
3. a material possibility, despite best efforts from both sides to conclude a ratified withdrawal agreement, that the United Kingdom may leave the European Union on March 30, 2019, without a transition period; and
4. the necessary mitigating actions that take time and that should be pursued without delay.

The opinion states that where Brexit contingency planning is taking place, firms are delaying its implementation and continuing to await political solutions. The EBA emphasizes that firms should act now and "financial stability should not be put at risk because financial institutions are trying to avoid costs."

The Bank of England's governor, Mark Carney, has criticized the EBA's opinion as "incomplete" since it fails to acknowledge the temporary permissions regime proposed by the UK government.

The EBA's opinion is available [here](#).

EBA Consults on Guidelines for Outsourcing Business Activities

On June 22, the European Banking Authority (EBA) published a consultation paper with draft guidelines on arrangements for outsourcing business activities.

The EBA's draft guidelines differentiate between the nature of the functions outsourced so that functions that are more critical are subject to stricter and stronger requirements. The guidelines include:

1. ultimate responsibility for the proper management of the risks associated with outsourcing or of the outsourced activities lies with an outsourcing institution's senior management (i.e., outsourcing arrangements can never result in the true delegation of senior management's responsibility);
2. outsourcing must not lead to a situation where an institution becomes a so called "empty shell" that lacks the substance to remain authorized; and
3. outsourcing, for the purposes of the guidelines, does not include the acquisition of services (e.g., legal representation and catering) or utilities not typically performed by the institution.

The EBA's draft guidelines build on existing guidelines for credit institutions on outsourcing published in December 2006 by the Committee of European Banking Supervisors (CEBS). However, the EBA's draft guidelines extend to establish a more harmonized mandate for all financial institutions, including investment firms.

The EBA's consultation paper is available [here](#).

European Commission Confirms MiFID II Ancillary Exemption Test on An Entity-By-Entity Basis

In a May 31 letter, the Vice President of the European Commission (EC), Valdis Dombrovskis, provided confirmation to the Chair of the European Securities and Markets Authority (ESMA) regarding the test to apply the ancillary activity exemption under Article 2(1)(j) of the revised Markets in Financial Instruments Directive (MiFID II).

In April 2018, ESMA had sought clarification on whether to assess ancillary activity at a group level or at a single entity level (for more information, see the [Corporate & Financial Weekly Digest](#) edition of April 13, 2018). The letter confirms that the test should be applied at a single entity level (i.e., it must be calculated as many times as necessary for each entity who trades in commodity derivatives within a group).

The letter is available [here](#).

UK's EU Withdrawal Act Receives Royal Assent

On June 26, the European Union (Withdrawal) Act 2018 (Withdrawal Act) received royal assent, which is the final stage for approving UK parliamentary bills.

The [Corporate & Financial Weekly Digest](#) edition of July 14, 2017 included a substantive review of the Withdrawal Act. Notably, the House of Commons amended that bill to require that any EU withdrawal agreement must be debated and voted on by the House of Commons before the European Parliament consents to the withdrawal agreement being concluded on behalf of the European Union.

The Withdrawal Act is available [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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BREXIT/UK/EU DEVELOPMENTS

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