

## BROKER-DEALER

### **FINRA Encourages Firms To Disclose Activities Related to Digital Assets**

On July 6, the Financial Industry Regulatory Authority published Regulatory Notice 18-20, which encourages member firms to promptly notify FINRA if the firm or any of its associated persons or affiliates engages or intends to engage in any activities involving digital assets, such as cryptocurrencies and other virtual coins and tokens. Digital assets activities include those relating to digital assets that are not securities and the activities under Rule 3270 (Outside Business Activities of Registered Persons) and Rule 3280 (Private Securities Transactions of an Associated Person).

Examples of activities that may be disclosed include, but are not limited to:

- Purchases, sales or executions of transactions in digital assets or in pooled funds that invest in digital assets;
- Creation of, management of or provision of advisory services for a pooled fund related to digital assets;
- Participation in an initial or secondary offering of digital assets;
- Creation or management of a platform for the secondary trading of digital assets; or
- Cryptocurrency mining.

FINRA has also requested that members voluntarily provide it information related to purchases, sales or executions in derivatives related to digital assets. Presumably this applies to bitcoin futures transactions on the Chicago Mercantile Exchange and the Cboe Futures Exchange.

Until July 31, 2019, FINRA members should keep their Regulatory Coordinators informed of the digital asset activities of the firm, as well as the firm's associated persons or affiliates that were not previously disclosed—although this is also voluntary. Unless a change in such activities has occurred, FINRA is not requesting additional notice from those members who have already disclosed digital asset activities pursuant to a direct request, via the 2018 Risk Control Assessment Survey or through a continuing membership application.

Regulatory Notice 18-20 is available [here](#).

### **SEC Sets Agenda for Fixed Income Market Structure Advisory Committee Meeting**

On July 16, the Securities Exchange Commission will host a meeting of the Fixed Income Market Structure Advisory Committee. The agenda includes the following items for discussion:

1. Pre-Trade Transparency Under MiFID II
2. Current State of Pre-Trade Transparency in the US Corporate Bond Market
3. Current State of Pre-Trade Transparency in the US Municipal Securities Market

#### 4. Electronic Trading Venue Regulation—Draft Recommendation

#### 5. ETFs and Bond Funds Subcommittee Update

The meeting is open to the public and will be held at the SEC headquarters in Washington, DC. A live webcast will be available through the SEC's website. More details are available [here](#).

### **SEC Open Meeting Agenda Announced**

On July 18, the Securities Exchange Commission will host an open meeting to discuss various regulatory proposals. Among other agenda items, the meeting will cover whether the SEC should adopt amendments to Rule 3a1-1 and Regulation ATS and new Form ATS-N under the Securities Exchange Act of 1934 related to certain alternative trading systems (ATSS).

The SEC originally proposed creating Form ATS-N in 2015. If adopted, Form ATS-N would require NMS Stock ATSS to publicly disclose detailed information about the operations and activities of a broker-dealer operator and its affiliates. More information about the proposal is available in the November 20, 2015 edition of [Corporate & Weekly Financial Digest](#).

Information about the upcoming open meeting is available [here](#).

### **FINRA Launches Enhanced Public Records Review**

On July 5, the Financial Industry Regulatory Authority announced an enhanced disclosure review process of individuals seeking registration with a brokerage firm. As of July 9, FINRA intends to conduct a public records review of an individual after a Form U4 is submitted for such individual's registration. FINRA will contact the applicant's firm within 15 calendar days of the submission of the application if FINRA's review indicates that the Form U4 information is incomplete or contains discrepancies. FINRA's enhanced public records review does not relieve firms or registered representatives of their duty to keep their records up to date.

More information is available [here](#).

## **DERIVATIVES**

### **ISDA Publishes IBOR Replacement Consultation**

On July 12, the International Swaps and Derivatives Association (ISDA) published a document entitled *Consultation on Certain Aspects of Fallbacks for Derivatives Referencing GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW* (Bank Bill Swap Rate) that is intended to solicit market input on how the derivatives markets can best create alternatives to the interbank offered rates (IBORs) currently referenced in derivatives transactions. This is one of many current market initiatives that are responding to the likelihood that many IBORs will cease to be published or cease to have appropriate liquidity after 2021 and must therefore be replaced by new benchmark rates based on the overnight risk-free rates (RFRs) that are being adopted for each major currency.

The *Consultation* complements ISDA's plans to amend the standard 2006 ISDA Definitions to define the permanent discontinuance of a benchmark rate and to provide fallbacks for such an eventuality. These plans contemplate that the fallback rate for each currency will be the relevant RFR adjusted using methodologies to account for (1) the fact that the RFR is an overnight rate and (2) the various premiums (including credit spreads) included within the IBOR that has been discontinued. Once the discontinuance trigger has been defined and the fallbacks have been identified, ISDA anticipates that it will publish a protocol to assist the market in amending swap documentation to introduce the new rates.

The *Consultation* sets out four options for choosing a base RFR for use in creating term rates comparable to a discontinued benchmark rate. It then discusses various methodologies for adjusting the base RFR for the credit and other spreads in the replaced benchmark. The methodologies were identified based on the following criteria: (1) eliminating or minimizing value transfer at the time the fallback is applied; (2) eliminating or minimizing any

potential for manipulation; and (3) eliminating or mitigating against the impact of market disruption at the time the fallback is applied.

ISDA highlights two important points in the *Consultation*:

1. The *Consultation* covers only GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW. ISDA says it will launch supplemental consultations covering USD LIBOR, EUR LIBOR and EURIBOR, but requests preliminary feedback on the technical issues associated with fallbacks for these benchmarks in this consultation.
2. ISDA notes that efforts are also underway globally to implement fallbacks for other products (e.g., loans, bonds, notes) that reference IBORs, but the *Consultation* does not discuss or cover whether the adjusted RFRs and spread adjustments it proposes would be appropriate for fallbacks in those other products. (Logically, however, the optimal result will be to have the same fallback used for all purposes.)

ISDA will accept responses to the *Consultation* until October 12.

The *Consultation* is available [here](#).

## UK/BREXIT DEVELOPMENTS

### UK Regulations Published, Amending FSMA To Implement EU Prospectus Regulation

On June 29, the Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018 were published. The Regulations make some minor amendments to the Financial Services and Markets Act 2000 (FSMA) for the purposes of the United Kingdom's implementation of part of the new EU Prospectus Regulation (Prospectus Regulation).

The Prospectus Regulation consolidates the existing EU Prospectus Directive provisions relating to the scope of the requirement to publish a prospectus and makes a number of adjustments to the types of offer and issue of securities captured by the regime. It also introduces an option for EU member states to exempt further offers from the prospectus requirement, provided they notify the European Commission and European Securities and Markets Authority in accordance with the Prospectus Regulation.

The Regulations increase the threshold for offers to the public that are exempt from the obligation to publish a prospectus under FSMA from €100,000 to €8 million.

The Regulations also reduce the threshold for securities exempt from the prospectus regime under FSMA from €5 million to €1 million. According to the Prospectus Regulation, this is intended to prevent the cost of producing a prospectus from being disproportionate to the offering proceeds.

In addition, as part of the United Kingdom's transposition of the revised Markets in Financial Instruments Directive (MiFID II), the Regulations include other minor amendments to FSMA as well as other primary and secondary legislation.

The Regulations become effective on July 21.

The Regulations can be accessed [here](#), with the accompanying explanatory memorandum available [here](#).

The Prospectus Regulation is available [here](#).

### First European Union (Withdrawal) Act Delegated Legislation Created

On July 3, the Department for Exiting the European Union created the European Union (Withdrawal) Act 2018 (Commencement and Transitional Provisions) Regulations 2018 (Regulations). The United Kingdom's European Union (Withdrawal) Act 2018 (Act) delegates power to make such provisions.

The Regulations are split based on their effective date:

1. The effective date of certain provisions of the Act, July 4, (First Appointed Day)— the Regulations include provisions relating to (1) the cessation of EU law supremacy and its application to UK law after the United Kingdom’s withdrawal from the European Union, and (2) the use of EU law for interpretation in domestic tribunals and courts; and
2. The date of the United Kingdom’s withdrawal from the European Union, March 29, 2019 (Exit Day)—the Regulations provide for the repeal of UK acts relevant to its membership of the European Union which have not already been repealed.

The Regulations also contain transitional provisions which carve out EU obligations from “international obligations” under the Small Business, Enterprise and Employment Act 2015 with respect to any provision under review between the First Appointed Day and Exit Day. Further transitional measures authorize future UK actions without EU approval, even where such approval is required according to the underlying UK act.

The Regulations, with accompanying explanatory note, are available [here](#).

### **FCA Proposes New Financial Services Workers Directory and Announces Date for New SM&CR Regime**

On July 4, the UK Financial Conduct Authority (FCA) issued a press release announcing its proposal to introduce a new public directory of the status and history of individuals working in financial services (including information on their prior employers, any enforcement actions, prohibitions, etc.).

The proposal aims to improve the user experience, with more information available than before on those who work in financial services and accessible from a single source by both consumers and firms. The proposed directory’s scope will increase to include certain individuals who are not currently required to be listed in the FCA’s financial services register. At present, firms can elect to certify individuals who are ranked lower than “senior manager,” but do not have to do so.

Following completion of its consultation process (details of which were covered in the July 28, 2017 edition of [Corporate & Financial Weekly Digest](#)), the FCA published a policy statement regarding the extension of the Senior Managers & Certification Regime (SM&CR) to FCA solo-regulated firms on July 4—the extension will now commence on December 9, 2019.

The FCA has also published a guide for solo-regulated firms setting out the main features of the SM&CR and details with respect to the transition to SM&CR. The FCA recommends that firms preparing for the SM&CR read the guide.

The FCA’s press release concerning the proposed directory is available [here](#).

The FCA’s policy statement regarding the extension of SM&CR to solo-regulated firms is available [here](#).

The FCA’s guide for solo-regulated firms is available [here](#).

### **UK Government Unveils Brexit White Paper**

On July 12, the UK Department for Exiting the European Union published a white paper, which sets out the United Kingdom’s proposal for the UK-EU relationship after the United Kingdom’s withdrawal from the European Union on March 29, 2019 (Brexit) through what it terms “an association agreement.” Notably, the white paper features differing approaches with respect to movement of goods, services and people.

Regarding services, the white paper supports a new arrangement, which would reduce the level of UK-EU access (and vice versa) from the existing position. For financial services, the UK government advocates a framework based around upgrading current third-country equivalence regimes to reflect the interconnectedness between the United Kingdom and the European Union; this would include a reciprocal recognition of equivalence under all existing third-country regimes, effective from the end of the implementation period (intended to be December 2020), to provide initial confidence to the markets. Crucially, however, the new framework would not replicate the current EU passporting regimes.

In terms of future equivalence and determinations, the white paper supports an arrangement through “a bilateral framework of treaty-based commitments” which should include:

1. Common principles and objectives for the governance of the relationship;
2. Extensive supervisory cooperation and regulatory dialogue from an early stage of any proposed changes; and
3. Predictable, transparent and robust processes (including a transparent assessment methodology, and a structured withdrawal process, for equivalence).

The white paper states that both sides should also express their shared intention to avoid divergent regulation of financial services to reduce the potential for regulatory arbitrage, while simultaneously respecting one another’s autonomy to legislate for their respective interests (e.g., allowing the United Kingdom to impose higher than global standards in certain cases).

In addition, according to the white paper, although it will no longer have jurisdiction in the United Kingdom after Brexit, the Court of Justice of the European Union will remain the interpreter of EU rules. In effect, the United Kingdom will continue to be subject to EU case law where it is adhering to a common UK-EU rulebook (e.g., relating to goods and state aid).

The white paper represents a compromise position from the UK government, but may not be seen as going far enough by the EU negotiators. In particular, previous EU statements have warned that the United Kingdom cannot “cherry pick” in relation to free movement of goods, services and people. The publication of the white paper is perceived by many as a significant step in the Brexit negotiations, and the UK and EU financial media reports that both sides continue to hope that a deal can be reached in autumn 2018, prior to the official exit day in March 2019.

The white paper is available [here](#).

## EU/BREXIT DEVELOPMENTS

### ESMA Releases Latest Double Volume Cap Data Under MiFID II

On July 6, the European Securities and Markets Authority (ESMA) updated its public register with the latest set of double volume cap (DVC) data under the revised Markets in Financial Instruments Directive (MiFID II). The update follows last month’s update to the DVC public register (for further details, see the June 15 edition of [Corporate & Financial Weekly Digest](#)).

New breaches total 70 equities for the 8 percent cap, which applies to all trading venues, and 37 equities for the 4 percent cap, which only applies to individual trading venues. For those instruments in breach of the caps, suspensions of trading under the waivers apply from July 11, 2018 to January 11, 2019. Due to corrected data received by ESMA, for 13 instruments, previously identified breaches of the 8 percent and 4 percent caps are incorrect and the relevant suspensions of trading under the waivers should be lifted, according to ESMA’s announcement.

As of July 6, a total of 1,024 instruments are suspended.

ESMA’s announcement in relation to the updated DVC register is available [here](#).

### ESMA Issues Statement Warning Firms of No Deal Brexit Risk

On July 12, the European Securities and Markets Authority (ESMA) released a public statement concerning the timely submission of requests for authorization regarding the United Kingdom withdrawing from the European Union (Brexit).

The public statement highlights the absence of any assurance that a transition period will be agreed prior to March 30, 2019 (Exit Day); therefore, firms need to consider the so-called “hard Brexit” scenario. If a hard Brexit occurs,

firms will need to have a fully authorized legal entity located in one of the remaining EU member states (EU27) on Exit Day to continue providing services in the EU27.

Although, according to the public statement, the number of authorization requests to EU27 authorities has increased already, ESMA urges others seeking to relocate to the EU27 to submit their applications as soon as possible. Some EU27 regulators have confirmed that they cannot guarantee authorization by Exit Day for applications received after July 2018.

ESMA previously published opinions to support supervisory convergence post-Brexit (see the July 14, 2017 edition of [Corporate & Financial Weekly Digest](#)).

ESMA's public statement is available [here](#).

### **ECON Supports Greater Input on Equivalence of EU/Third-Country Rules by European Parliament**

On July 11, the European Parliament's Committee on Economic and Monetary Affairs (ECON) published a press release announcing that ECON has adopted a draft report on relationships between the EU and third countries concerning financial services regulation and supervision.

The report advocates a structured and practical framework for recognizing and supervising equivalent third-country frameworks, on the basis that the current EU process lacks certainty and sufficient transparency. According to the report, equivalence decisions should be taken via a delegated act of the European Union in order to allow for appropriate scrutiny by the European Parliament and the Council of the European Union, rather than being made unilaterally by the European Commission.

The European Parliament is now scheduled to consider the report in plenary in September. The European Parliament's vote was previously postponed because it could have pre-empted its position on equivalence in light of Brexit negotiations.

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

The text of the draft report, published in April, 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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UK/EU/BREXIT DEVELOPMENTS

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