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External in-house counsel

"NO DEAL EXIT" MEASURES INTENSIFY

March 2019

Following the recent developments in the British Parliament, which for the third time today rejected the withdrawal deal agreed back in November 2018 by the UK Prime Minister and the EU negotiation team; continuing uncertainty results over the UK departure from the EU.

Despite the recent request submitted by the UK Prime Minister asking for an extension of the two years negotiation period granted by article 50 of the Lisbon treaty, it is still not clear if, and for how long, such an extension will be granted. Furthermore, even if a decision on an extension is reached, if the deadlock persists on a long term solution, the ongoing uncertainty could just roll over to the next deadline.

Therefore, our examination of the measures taken to prevent the worst disruption arising in case of an exit of the UK from the EU without a deal ("a no deal exit") still holds its relevance, as these measures are directed to avoid negative consequences and disruptions for citizens, business, and financial markets.

THE FCA PUBLISHES FINAL GUIDELINES IN CASE OF NO DEAL EXIT

Since the political uncertainty surrounding the circumstance in which the UK will leave the EU, if will at all, the Financial Conduct Authority (the "**FCA**") has been working to deliver a transition that is as smooth as possible, in order to limit the possible disruption consequence of a no deal exit.

Following the February publication of the FCA's Policy Statement with near-final instruments, the FCA has today published its final instruments and guidance that will apply in the event the UK leaves the EU without a deal, and as a consequence without the implementation period contained in the withdrawal agreement. They aim to ensure that firms have certainty of the financial regime they will be operating within, and so can plan accordingly to meet the needs of their customers.

The package of documents published contains the majority of the final instruments and guidance, which have been made under powers given to the FCA under the EU (Withdrawal) Act. They have been approved by the Treasury, so the FCA has now made them final.

The final instruments are largely unchanged from the near-final versions published in February.

The most significant changes are as follows:

- the instruments now commence on 'exit day', rather than 11pm on 29 March 2019, in order to reflect the change of date decided at the European Council on 21 March 2019, as well as the changes made by the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019; and
- publishing final transitional directions and guidance for the FCA to use its transitional power. The FCA has identified three additional areas where it has made amendments to the near-final directions published in February 2019, and specifically:
  (a) UK managers of EEA UCITS funds;
  (b) the application of the Client Assets sourcebook (CASS) to activities carried on from an EEA branch; and
  (c) the distance marketing provisions.

The FCA has clarified that it will publish information about technical standards under EU legislation on capital requirements, banking resolution and financial conglomerates later once the PRA have published similar information.

More fundamentally, the FCA has also extended the notification window for firms who wish to enter the TPR until the end of 11 April 2019.

Further information on how regulated firms could be affected by Brexit has been published on the FCA website. This includes information specific to the banking sector, UK-based pensions and retirement income firms, general insurance firms, retail firms, wholesale banks, markets and asset managers operating in the UK.

THE FCA AND THE US SEC AGREE MOU FOR UPDATED SUPERVISORY COOPERATION

The FCA has been working with other supervisory authorities at EU and national states level to ensure there is minimal disruption brought by the eventuality of a no deal Brexit.

The FCA has also been working globally to ensure the same aim at a more general level. As part of this effort, the FCA and the United States Securities and Exchange Commission (the ”**SEC**”) have reaffirmed their commitment to continue close cooperation and information sharing in the event of a no deal Brexit. Two updated Memoranda of Understanding (“**MOUs**”) have been signed today which aim to ensure the continued ability to cooperate and consult with each other regarding the effective and efficient oversight of regulated entities across national borders.

The SEC and the FCA have a long history of effective cooperation on supervisory and other matters. The amended MOUs entered into today reaffirm this commitment and collaboration with respect to the oversight of their respective registrants for the benefit of their markets and investors.

These MOUs will ensure the UK can continue to be a key market for funds and fund managers, ensuring continuity and stability for consumers and investors in the UK and US.

The first MOU, originally signed in 2006, is a comprehensive supervisory arrangement covering regulated entities that operate across the national borders. The MOU was updated to, among other things:

- expand the scope of covered firms under the MOU to include firms that conduct derivatives, credit rating and derivatives trade repository businesses to reflect post-financial crisis reforms related to derivatives; and
- cover the FCA’s assumption of responsibility from the European Securities and Markets Authority for overseeing credit rating agencies and trade repositories in the event of the UK’s withdrawal from the EU.

The second MOU, required under the UK Alternative Investment Fund Managers Regulations, was originally signed in 2013, providing a framework for supervisory cooperation and exchange of information relating to the supervision of covered entities in the alternative investment fund industry. The updated MOU ensures that investment advisers, fund managers, private funds and other covered entities in the alternative investment fund industry that are regulated by the SEC and the FCA will be able to continue to operate on a cross-border basis without interruption, regardless of the outcome of the UK’s withdrawal from the EU.

These two MOUs will come into force on the date EU legislation ceases to have direct effect in the United Kingdom.

At today’s meeting in London, the authorities’ chairman also discussed risks posed by jurisdictional share trading obligations, which could increase market fragmentation and impose unnecessary costs on investors.

NEXT STEPS

We will continue to send out regular updates on the development of no deal preparations in these and other EU jurisdictions, as soon as they are available.

To access the FCAs final instruments and guidance, please click here.

To access the FCAs press release, please click here.

For more information on or any guidance or advice in navigating Brexit, Cleveland & Co external in-house counsel, your specialist outsourced legal team are here to help

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CONTACT

EMMA CLEVELAND

Founder and Managing Director

+44.79.6387.8756
ecleveland@cleveland-co.com
www.cleveland-co.com