



25 January 2019

Brexit Implementation Team  
HM Treasury  
1 Horse Guards Road,  
London, SW1A 2HQ

Dear Sir or Madam,

### **Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019**

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

In June 2016, the U.K. voted by way of an in/out referendum to withdraw from the European Union ("**Brexit**"). On 29 March 2019, under the process prescribed by Article 50 of the Treaty on European Union ("**TEU**"), the U.K. will cease to be an E.U. Member State. A post-Brexit longer-term relationship is, as yet, undecided and, therefore, preparations on the domestic front have focused on a "no deal" eventuality. A key element of these preparations is the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") which aims, *inter alia*, to incorporate into U.K. law all applicable E.U. legislation and gives powers to Ministers to make any such amendments to retained law as are necessary to deal with any deficiencies arising from withdrawal. Under the Withdrawal Act, HM Government has published drafts of statutory instruments "onshoring" E.U. legislation; this letter concerns the draft Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (the "**draft FSMA SI**").<sup>1</sup>

The draft FSMA SI amends the Financial Services and Markets Act 2000 ("**FSMA**") which, together with related secondary legislation, defines the "regulatory perimeter," setting out the activities and entities that fall within the scope of U.K. financial services regulation and sets out the requirements and procedures for financial services entities to be authorised to carry on such activities in the U.K. It also provides the financial services regulators with the supervision and enforcement functions. The draft FSMA SI amends those provisions of FSMA which are dependent on provisions in E.U. legislation, such as definitions which are found originally in E.U. law or are based on an activity being carried out within the E.U.

Regulation 39 of the draft FSMA SI updates the financial promotion rules provided in section 137R of the Act. Section 137R(4) states that the FCA may make rules applying to authorised persons in relation to communications by or approved by them if the FCA considers that such rules are required to ensure compliance with certain "listed requirements". Regulation 39(4) inserts a new clause (5A) in section 137R explaining that these "listed requirements," mean requirements under the law of the U.K. which "*appear to the FCA to correspond to the requirements of*" various E.U. legislation, including specific Articles of Directive 2014/65/EU on markets in financial

<sup>1</sup> As with all the SIs published in pursuit of the aims of the Withdrawal Act, the FMLC understands that the draft FSMA SI will be laid before Parliament with the intention of implementing a policy position arising from a "no deal" Brexit. The Committee does not comment on matters of policy or the form that future regulatory approaches, if any, should take and this letter should not be understood to constitute comments thereon.

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instruments (“**MiFID II**”) and delegated legislation adopted under them, of Directive 2014/91/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (the “**UCITS Directive**”) and of Directive (EU) 2016/97 on insurance distribution (the “**Insurance Distribution Directive**”) (emphasis added). This seems to be a definition with a significant penumbra of uncertainty, especially given the size of the *acquis* of modified retained E.U. law with which the markets will be contending. A more specific list, such as that included in the original clause—albeit altered to refer to U.K. legislation—would be immensely useful.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,



Joanna Perkins  
FMLC Chief Executive<sup>2</sup>

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<sup>2</sup> In view of the role of the Bank of England, the Financial Conduct Authority and HM Treasury in the U.K.'s preparations for withdrawal from the E.U., Sinead Meany, Sean Martin and Peter King took no part in the preparation of this paper and the views expressed should not be taken to be those of the Bank of England, the FCA and HM Treasury.

The FMLC is grateful to Simon Morris of CMS Cameron McKenna Nabarro Olswang LLP for his assistance in drafting and reviewing this paper.