

15 August 2019

Mr Ola Ajadi
HM Treasury
The Correspondence and Enquiry Unit
1 Horse Guards Road
London
SW1A 2HQ
London



Dear Mr Ajadi,

Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013

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.

As you know, Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (the "European Market Infrastructure Regulation" or "EMIR") was implemented in the U.K. by making amendments to the Financial Services and Markets Act 2000 ("FSMA") and the Companies Act 1989. These amendments were made by means of the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (the "2013 Regulations").

The FMLC understands that HM Treasury is conducting a mandatory review of the 2013 Regulations, focusing on, *inter alia*, the effect of these regulations on the industry, their unintended consequences, and their impact on small businesses. To that end, the FMLC trusts that HM Treasury will receive feedback from market participants more closely involved in those aspects. In the event that HM Treasury, as part of its review, examines the amendments made by the 2013 Regulations to the Companies Act 1989, the FMLC would like to draw HM Treasury's attention to certain issues of legal uncertainty.

In 2016, the Committee undertook research on issues of legal complexity arising in the context of proprietary claims to collateral under Part VII of the Companies Act 1989. The FMLC published a report on 10 October 2016, (the "FMLC Report"), which is enclosed with this letter.¹

The FMLC Report drew attention to issues of legal uncertainty in the default management processes of a central counterparty (a "CCP"), which were designed to meet certain regulatory objectives and requirements, including the reduction of systemic risk and the implementation of safeguards for (non-defaulting) clients. The FMLC Report drew attention to legal uncertainties which could potentially arise in the context of:

- (i) the protection for CCPs without actual notice of third party interests;
- (ii) the definition of "margin" in section 177;
- (iii) the use of client trust acknowledgement letters;
- (iv) the practical steps typically taken by a CM to protect itself from becoming unhedged on the default of a client; and

¹ FMLC, *Report: Obligations of Central Counterparties and their Clearing Members under Part VII of the Companies Act 1989*, 10 October 2016, available at: <http://fmlc.org/report-emir-10-october-2016/>

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(v) the exercise of termination rights by clients.

To address these uncertainties, the FMLC made recommendations which include that further (i) attention is given to the need for protection against proprietary claims against assets and positions in CCP-provided accounts; (ii) clarification is given to specific definitions and concepts set out in Part VII; and (iii) consideration is given to the need to accommodate market best practice, as established by the prevailing industry standard documentation. These recommendations were amplified, where appropriate, by suggestions for revisions to Part VII of the 1989 Act and related regulation which could be adopted if amendments were thought desirable

At the time of publication, the FMLC Report received considerable support from market participants.

I and Members of the Committee hope that you will take the matters raised in this letter and the FMLC Report into account in the conduct of HM Treasury's review of the 2013 Regulations. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

A handwritten signature in black ink that reads "Joanna Perkins". The signature is written in a cursive style with a large initial 'J'.

Joanna Perkins
FMLC Chief Executive