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 **NORTON ROSE FULBRIGHT**

Financial regulation

Gafta / ICDA / STSA panel discussion

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1. EMIR and FinfraG update

(1) EMIR margin rules

- 04 February: application of margin for counterparties w/ agg. non-cleared average >EUR 3 trillion
- 01 March: application of VM requirements for all FC, NFC+
- Application to transactions with “third country NFCs”
- Exemptions for intragroup transactions

(2) Equivalence decisions

- CCPs: 22 of 46 applicants recognised by end-2016
- Third country markets: US, Australia, Canada, Japan and Singapore
- Jurisdictions: no progress on Article 13(2) EMIR decisions

1. EMIR and FinfraG update

(3) EMIR review

- Review mechanism
- Key changes sought by commodity market participants
- 2015: ESMA opinions and industry input
- Delay and outlook

(4) FinfraG application

- Key provisions reflect G20 commitments, DFA and EMIR
- Excluded: physically-settled commodity derivatives
- Improvements v EMIR (scope, trading rules, reporting)
- Application schedule

1. EMIR and FinfraG update

- Reporting by Article 93 categorisation (GNV: +/- CHF 8 billion)

FC

- Non-cleared trades w/ Small FC, NFC, Small NFC;
- Non-cleared trades with other FC if seller;
- Applies 01 July 2016;
- +6 months for contracts executed on-venue, OTF.

NFC

- Non-cleared trades w/ Small NFC;
- Non-cleared trades with other NFC if seller;
- Applies 01 October 2016;
- +6 months for contracts executed on-venue, OTF.

Small FC

- Non-cleared trades w/ NFC, Small NFC;
- Non-cleared trades with other Small FC if seller;
- Applies 01 October 2016;
- +6 months for contracts executed on-venue, OTF.

Small NFC

- Article 104(3) exemption for transactions between two small NFCs;
- Non-cleared trades w/ non-CH counterparty if that counterparty does not report;
- Applies 01 January 2017;
- +6 months for contracts executed on-venue, OTF.

2. New MAR regime

(1) MAR and CSMAD

- Revamp of market abuse regime with new minimum criminal sanctions
- Predicated on 3 core prohibitions
- Innovations: scope, strict liability, detect/report obligations
- Experiences to date

(2) Issues for commodity market participants

- Culture v compliance
- Inside information for commodity derivatives
- MM and “related spot commodity contracts”
- Benchmark manipulation
- PPA/ET requirements

3. MiFID II: what's ahead ?

(1) Overview of MiFID II and MiFIR

- Overhaul of EU's conduct and market regulation
- Barnier's five political scalps
- Authorisation, exemptions and third country persons
- Market structure reforms and new competition regulation

(2) “Financial instruments” definition

- MiFID II Annex I Section C
- C7: Article 7 CDR
 - (a) Key changes to “other derivative financial instrument” criteria
 - (b) Scope and “spot contract” guidance

3. MiFID II: what's ahead ?

(3) Ancillary Activity exemption

- Scope of regulated activity covered
- 3 x exclusions: banking groups, state-owned enterprises, etc.
- RTS 20: questions remain
 - (a) Application to third country persons
 - (b) Aggregation requirements
 - (c) Market size data
 - (d) Scope of “total size of trading activity” calculation
 - (e) “Capital employed” test and positions v GNV contracts
 - (f) Article 3(6) netting
 - (g) “Capital employed” test and credit institution, investment firm affiliates
 - (h) End-of-day assessments v annual notification
 - (i) FY2017 reporting, exemption and status of contracts

3. MiFID II: what's ahead ?

(4) Position limits and position reporting

- PLs scope
 - (a) Commodity derivatives ex. on EU trading venues (RM, MTF, OTF)
 - (b) Economically equivalent OTC contracts (EEOTC)
- Range and basis
- Hedging exemption
- PR scope
 - (a) Commodity derivatives
 - (b) Emission allowances
 - (c) Derivatives where underlying is an emission allowance
- Division of labour: trading venue v investment firm

3. MiFID II: what's ahead ?

– PLs issues

- (a) Hedging exemption for third country persons
- (b) Commodity index swaps as EEOTC contracts
- (c) Aggregation requirements
- (d) Varying NCA approaches to hedge exemption
- (e) What constitutes “deliverable supply”?
- (f) Consistency in setting limits for similar contracts
- (g) Safeguard mechanism

4. Prudential regulation

(1) New prudential regime for investment firms

- Commodities Dealers derogations and 3-year roll-over
- Article 508 CRR review ongoing
- EBA technical advice
- Key features of (pending) legislative proposal

(2) CRR II and CRD V

- Application of leverage ratio, stable funding, market risk and TLAC
- Article 501c 'freeze' for non-systemic investment firms
- LR: new SA-CCR provisions mitigate effects for clearing firms
- NSFR: 85% RSF means major increase in funding costs for physical trading
- CRD V: bad on hold co's, good on remuneration

5. Regulatory outlook

(1) Rise of the populists

- Brexit, Trump administration and FR, DE elections to come
- EU-UK negotiations will constrain HMG in medium-term
- Other EU Member States re-considering approaches to attract ‘refugees’
- Trump administration talks a big game but no major shift on DFA apparent

(2) International standards v EU, national law-making

- BCBS: no longer Moses on the mountain
- EU: adjust standards to specificities of Single Market
- US: Trump administration’s less diplomatic responses
- FSB: not given up on SIFI agenda
- IOSCO: often the jobs that no one else wants

6. Questions and comments

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