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BREXIT – REPORTING OF DERIVATIVES UNDER EMIR

To Our Clients and Friends:

In the event of the United Kingdom leaving the European Union without an agreed deal on 31 January 2020, UK counterparties will need to make changes to their derivatives reporting arrangements in advance of that date to ensure that they comply with the UK's European Market Infrastructure Regulation ("**EMIR**") reporting requirements immediately post-Brexit. This briefing sets out what steps UK counterparties to derivatives transactions should take now in relation to their reporting arrangements to ensure a smooth transition on and after Brexit.

EMIR and much of its secondary implementation legislation takes the form of a Regulation and is therefore (before exit) directly applicable in UK law. The European Union (Withdrawal) Act 2018 provides that EU legislation that is directly applicable, such as EU EMIR, will form part of UK law on exit day and gives power to the UK government to amend the legislation so that it operates effectively post-Brexit. Consequently, post-Brexit there will be two versions of EMIR: the original EU version which will continue to apply to EU counterparties to derivatives transactions, EU central counterparties ("**CCPs**") and EU trade repositories ("**TRs**") ("**EU EMIR**"); and the UK version incorporating amendments during the onshoring process to ensure the regime continues to operate effectively post-Brexit ("**UK EMIR**").

UK EMIR will operate parallel to EU EMIR. Both regimes aim to increase the resilience and stability of OTC derivative markets. UK EMIR sets out the regulatory regime relating to OTC derivatives transactions, CCPs and TRs in the UK. Like EU EMIR, UK EMIR imposes a number of requirements on derivatives market participants which include, among other things:

- The obligation to centrally clear certain standardised OTC derivative contracts;
- Requirements to reduce the risk arising from non-centrally cleared derivatives contracts through risk mitigation techniques; and
- The obligation to report derivatives transactions to a TR.

From exit day onwards, UK counterparties to derivatives contracts will need to comply with UK EMIR rather than EU EMIR (assuming that the UK leaves the EU with no transitional arrangements in place), including in relation to the reporting of its derivatives transactions. The UK Financial Conduct Authority ("**FCA**") released a statement to explain the changes that will be in store for TRs operating in the UK, UK counterparties and UK CCPs and what is expected with respect to compliance.[1]

The UK government has confirmed that, as far as possible, the policy approach set out in the EMIR legislation will not change after the UK has left the EU. This is unsurprising given that much of EMIR derived from commitments made at international level at the G20 in 2009.

What should UK counterparties be doing in advance of Brexit?

- Undertake an audit of the UK EMIR validation rules that will apply to reports submitted on or after Brexit to UK TRs. The UK EMIR validation rules diverge from the EU EMIR validation rules and therefore it is likely that operational changes will be necessary to ensure your UK EMIR reports are compliant post-Brexit.

- To the extent that a UK counterparty is currently reporting its trades to an EU TR, ensure that the necessary operational changes are made in advance of exit day to ensure that trades can be reported to a UK TR immediately post-Brexit. This may involve entering into new arrangements with a UK TR.

- For UK counterparties who have engaged a third party or their counterparty to perform their reporting for them (*i.e.*, "delegated" reporting), engage with their third party service provider or counterparty to ensure that they are making any necessary changes to ensure compliance post-Brexit.

- Any UK counterparties who have accepted a delegation from clients and agreed to report on their behalf, where those clients are based in the EU, reporting will need to be provided to an EU TR post-Brexit and for UK clients, reporting will need to be made to a UK TR for those clients. Ensuring that the necessary operational changes are made will be critical for all firms providing delegated reporting services.

- As all outstanding derivatives contracts entered into by a UK counterparty on or after 16 August 2012 must be held in a UK TR (whether registered or recognised) on exit day, UK counterparties should engage with their TRs to ensure all relevant trades are identified and to understand the porting process to their UK TR of choice by the date of exit.

What happens to outstanding trades post-Brexit?

All outstanding derivative trades entered into by UK counterparties on or after 16 August 2012, must be held in a UK registered, or recognised, TR by 11:00 p.m. UK time on exit day. This will require derivatives transactions of UK counterparties that remain outstanding to be ported to a UK TR in time for exit day and will require the necessary steps to ensure that new derivatives transactions will be reported to a UK TR beginning on exit day. UK counterparties would be well-advised to engage with their TRs to ensure orderly porting to their UK TR of choice by exit day and to ensure that all their relevant trades have been identified. UK counterparties should note that any updates to these trades required after Brexit will need to be made to the UK TR and not to the original EU TR.

[1] *See* FCA statement on the reporting of derivatives under the UK EMIR regime in a no-deal scenario, *available at* https://www.fca.org.uk/news/statements/fca-statement-reporting-derivatives-under-uk-emir-regime-no-deal-scenario (7 November 2019).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Financial Institutions and Derivatives practice groups, or the authors:

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