

PRIVATE AND CONFIDENTIAL

Date: December 22, 2017

To: Sarah Nicholson and Mark Hutchings
International Securities Lending Association (ISLA)

From: Michael Huertas
Manuel Lorenz

Re: **ISLA Art. 59 Commission Delegated Regulation 2017/565 Questions**

Dear Sarah, Dear Mark,

We refer to our memorandum dated 20 December 2017 relating to the SFTR Framework's interaction with the MiFID II/MiFIR Framework (the "**MiFID II Memo**"). We also refer to the ISLA Members call on 26 September 2017 and on 16 November 2017, in which we discussed reporting obligations in respect of execution of orders other than for portfolio management pursuant to Art. 59 Commission Delegated Regulation 2017/565¹ (the "**DR**") and Art. 25(6) MiFID II². This memorandum discusses these issues.

This memorandum is intended to provide general observations on Art. 25(6) MiFID II and Art. 59 DR obligations in order to facilitate further discussion of these issues among ISLA Members. This memorandum does not constitute legal advice nor does it (nor can it, given the absence of the counterparty specific circumstances and facts of the recipients of this memorandum) provide a statement as to a counterparty categorisation for regulatory purposes. Members are invited to consult Baker McKenzie as to specific analysis related to their counterparty specific circumstance and facts or should otherwise seek specific advice from their own internal and/or external legal advisers in relation to the circumstances of individual matters or cases where they may wish to consider the issues raised by application of the regulatory considerations discussed herein.

1. Analysis

- 1.1 Market participants that transact in securities financing transactions (**SFTs**), to which the SFTR³ and its subsidiary EU legislative instruments (collectively, the **SFTR Framework**) apply, are likely to also be engaging in activity that is subject to the MiFID II⁴ & MiFIR⁵ regime as well as the relevant subsidiary EU legislative instruments, (collectively, the **MiFID II/MiFIR Framework**). Consequently, as discussed in the MiFID II Memo, counterparties to a SFT are likely to be engaging in "MiFID business" when undertaking SFT activity.
- 1.2 Clause 3 (Loans of Securities) respectively of the 2010 - updated 2012 version and of the 2000 version of the Global Master Securities Lending Agreement (**GMSLA**) sets out (emphasis in bold):

¹ See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=DE>

² See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>

³ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

⁵ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

"Lender will lend Securities to Borrower, and Borrower will borrow Securities from Lender in accordance with the terms and conditions of this Agreement. The terms of each Loan shall be agreed prior to the commencement of the relevant Loan either orally or in writing (including any agreed form of electronic communication) and confirmed in such form and on such basis as shall be agreed between the Parties. Unless otherwise agreed, any confirmation produced by a Party shall not supersede or prevail over the prior oral, written or electronic communication (as the case may be)."

A number of market participants may however, where "confirmations" are exchanged, only exchange a "confirmation" pursuant to the GMSLA at the point or shortly following the SFT transaction entered into under the GMSLA having settled. These transaction confirmations may be issued and exchanged in a variety of forms in particular amongst sophisticated market participants.

1.3 By contrast, the reporting obligations in the MiFID II/MiFIR Framework were drafted primarily with the aim of protecting those persons that are categorised as MiFID "retail clients" and to improve both the timeliness of confirmations as well as the standardised content of information provided. In order to achieve that aim, in particular across the range of transaction and asset class types that the MiFID II/MiFIR Framework applies to, the legislative instruments, including Art. 59 DR, are drafted in an agnostic manner.

1.4 Consequently, these provisions are not drafted with SFTs or the SFTR in mind. They are also not drafted in a manner that takes account of the GMSLA's contractual provisions, nor market practice employed by users of GMSLAs both in respect of their contractual counterparties to the GMSLA nor the practice those counterparties apply when dealing with their own commercial counterparties/clients who may be directly or indirectly interested in the SFTs documented under the GMSLA.

1.5 Who is a firm's MiFID client?

The central question as to whether MiFID obligations are owed to a counterparty of a GMSLA transaction will be determined as to whether that counterparty qualifies as a "client" for MiFID purposes. If the counterparty qualifies as a "client" for MiFID purposes, then the degree of obligations will be driven by the MiFID client categorisation types awarded to a counterparty.

1.6 In a SFT setting we consider that the following relationships are relevant for the purposes of our analysis herein:

- (a) Financial services firm (**Dealer A**) engages in SFT activity with financial services firm (**Dealer B**), both acting in their capacity as principals. Dealer A and Dealer B are strictly for purposes herein referred to as "**street counterparties**", and are not acting on behalf of any clients (e.g. in a proprietary trading transaction booked in their trading book);
- (b) Dealer A, acting as agent on behalf of principal (**Principal 1**) engages in SFT activity with Dealer B who is acting in a principal capacity; and/or
- (c) Dealer A, acting as agent on behalf of Principal 1 engages in SFT activity with Dealer B, who is acting as agent on behalf of its own principal (**Principal 2**).

1.7 Whether a "client" relationship exists for purposes of MiFID will depend on a number of counterparty, transaction, relationship and documentation specifics. This is also driven by a combination of what exists in practice or may be documented across a range of contractual terms, fiduciary, agency and other similar obligations with analogous effect that may be in place between the parties.

- 1.8 The MiFID II/MiFIR Framework does not change the principles that have existed at law since the predecessor regime was introduced. As a general starting point, MiFID I in Art. 4(10) and MiFID II in Art. 4(9) define:

"client' means any natural or legal person to whom an investment firm provides investment or ancillary services."

Consequently the determination of "who is my client" will be driven by each party's perspective inasmuch as the perception of its relationship to the other, including with reference to what is or is not documented or being done in practice. This includes an assessment *inter alia*: of the nature of obligations that the parties have agreed to undertake, whether the relationship involves acts or work to be done for the other person or with another person.

- 1.9 In the hypothetical relationships set out in paragraph 1.6 we note that the following MiFID "client" relationships between the parties could apply:

Y = possible "MiFID client" N or N/A	Dealer A	Dealer B	Principal 1	Principal 2
Dealer A	N/A	Depends, see position below and largely fact driven	Y, likely to have a commercial relationship that constitutes a MiFID client relationship if Dealer A is acting as agent of Principal 1	N
Dealer B	Depends, see position below and fact driven	N/A	N	Y, likely to have a commercial relationship that constitutes a MiFID client relationship if Dealer B is acting as agent of Principal 2
Principal 1	Y, likely to have a commercial relationship that constitutes a MiFID client relationship if Dealer A is acting as agent of Principal 1	N	N/A	Y, if trading bilaterally
Principal 2	N	Y, likely to have a commercial relationship that constitutes a MiFID client relationship if Dealer B is acting as agent of Principal 2	Y, if trading bilaterally	N/A

- 1.10 We do however note that certain jurisdictions, and the respective national competent authorities responsible for supervision of compliance with the predecessor to the MiFID II/MiFIR Framework, have considered that each counterparty is a client (a **blanket approach**). An assessment of whether this blanket approach applies in a specific jurisdiction across the EU is beyond the scope of this memorandum.
- 1.11 In the UK, the rules of the FCA Handbook, notably those in COBS 3.1 (Application), as supplemented by the definitions in the FCA Glossary clarify who is a "client"ⁱⁱ. The general definition in COBS 3.2.1 R states (both on 1 December 2017 and using the "time travel" function as at 3 January 2018), with reference to Art. 4(1)(9) of MiFID II that a client is (emphasis bold):
- "(1) A **person to whom a firm provides, intends to provide or has provided:***
- (a) a service in the course of carrying on a **regulated activity;** or*
- (b) in the case of **MiFID or equivalent third country business, an ancillary service,***
*is a "client" of that **firm;***
- (2) A "client" includes a potential client.*
- (3) In relation to the **financial promotion rules, a person to whom a financial promotion is or is likely to be communicated is a "client" of a firm that communicates or approves it.***
- (4) A client of an **appointed representative or, if applicable, a tied agent is a "client" of the firm for whom that appointed representative, or tied agent, acts or intends to act in the course of business for which that firm has accepted responsibility under the Act or MiFID (see sections 39 and 39A of the Act and SUP 12.3.5 R).***"
- 1.12 The definition in B(1)(b)(v) states currently (as at 1 December 2017 and using the "time travel" function as at 3 January 2018) that a client relationship can arise in the following circumstance:
- " (v) if a **person ("C1"), with or for whom the firm is conducting or intends to conduct designated investment business, is acting as agent for another person ("C2"), either C1 or C2 in accordance with the rule on agent as client COBS 2.4.3 R;**"*
- 1.13 This reference from the FCA Glossary definition of "client" is also replicated in the Rule in COBS 3.2.3(1) R, which in turn also cross-references to the rule in COBS 2.4.3 R. Applying this to the hypothetical relationships illustrated in paragraphs 1.6 and 1.9 we note that in applying this to an agency lending relationship, such as what is described in paragraph 1.6(c) the following will likely apply:
- (a) Principal 1 will likely be a "client" for Dealer A;
- (b) Principal 2 will likely be a "client" for Dealer B;
- (c) Whether the "street counterparties" are "clients" of one another will be down to the contractual relationship.
- 1.14 Before looking at the UK's rules in COBS 2.4.3 R it is important to note that irrespective of SFT activity constituting MiFID business, that the SFT activity will also, also in an agency lending arrangement, be a "regulated activity" and will constitute "designated investment business" pursuant to the UK's Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), as amended.
- 1.15 COBS 2.4.3 R (as from 3 January 2018) states:

"(1) If a *firm* (F) is aware that a *person* (C1) with or for whom it is providing services is acting as agent for another person (C2) in relation to those services, C1, and not C2, is the *client* of F in respect of that business.

(2) Paragraph (1) does not apply if:

(a) F has agreed with C1 in writing to treat C2 as its *client*; or

(b) C1 is neither a *firm* nor an *overseas financial services institution* and the main purpose of the arrangements between the parties is the avoidance of duties that F would otherwise owe to C2.

If this is the case, C2 is the *client* of F in respect of that business and C1 is not.

(3) If there is an agreement under (2)(a) in relation to more than one C2 represented by C1, F may discharge any requirement to notify, obtain consent from, or enter into an agreement with each C2 by sending to, or receiving from, C1 a single communication expressed to cover each C2, except that the following will be required for each C2:

(a) separate risk warnings required under this sourcebook;

(b) separate confirmations under the requirements on occasional reporting (*COBS 16.2* or *COBS 16A.3*); and

(c) separate *periodic statements*."

1.16 The principles behind the rule in COBS 2.4.3 R are not new but rather can go back to the UK Financial Services Authority's 2006 "Implementing MiFID's Client Categorisation requirements" document⁶. Other EU jurisdictions may not have a similar rule to that of COBS 2.4.3 R. On the assumption that COBS 2.4.3 R applies to a given commercial arrangements between Dealer A and Dealer B in relation to their SFT activity and that of agency lending, then in applying this to hypothetical set of relationships described in paragraph 1.6 notably sub-paragraph (c) we would anticipate that, for purposes of COBS 2.4.3 R:

(a) both Dealer A and Dealer B are each a firm and thus each "F"; and

(b) viewing this from Dealer A's perspective, as F, Dealer B is "C1" and Principal 2 is "C2",

consequently, both Dealer A (as F) and Dealer B (as C1) will need to stipulate whether C1 or C2 is to be treated as the client of F for purposes of COBS 2.4.3 R and thus also be a "client" for purposes of the MiFID II/MiFIR Framework and notably Art. 25(6) MiFID II and Art. 59 DR.

In the absence of any stipulation to the contrary, then Dealer A's (as F) client will be Dealer B (as C1) and not the principal (as C2).

1.17 **The position in Art. 25(6) MiFID II and Art. 59 DR**

At the EU legislative level, the reporting obligations of Art. 25(6) MiFID II and Art. 59 DR apply to and require that MiFID investment firms provide specific reports to those persons that are clients of that investment firm, having carried out an order on behalf of that client.

1.18 **Art. 25(6) MiFID II**

As with Art. 19(8) in MiFID I, the overall aims of Art. 25(6) MiFID II are to introduce a general obligation to provide the MiFID client with adequate standards in terms of detail and the frequency of

⁶ http://www.fsa.gov.uk/pubs/other/mifid_classification.pdf see notably section 4.4.

reporting in respect of the investment firm's activities and services undertaken for the client. Art. 25(6) MiFID II sets a transaction driven reporting goal i.e., it ensures that the client receives a transaction confirmation in an appropriately timely manner. The aims in the Level 1 MiFID II text, which go far beyond what was in MiFID I, are supplemented in Art. 59 DR. These obligations and the practical impact are explored in turn below.

1.19 Art. 25(6) MiFID II reads as follows:

*"The investment firm shall provide the client with adequate reports **on the service provided in a durable medium**. Those reports shall include periodic communications to clients, **taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client** and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.*

***When providing investment advice**, the investment firm shall, before the transaction is made, provide the client with a statement on suitability in a durable medium specifying the advice given **and how that advice meets the preferences, objectives and other characteristics of the retail client**.*

Where the agreement to buy or sell a financial instrument is concluded using a means of distance communication which prevents the prior delivery of the suitability statement, the investment firm may provide the written statement on suitability in a durable medium immediately after the client is bound by any agreement, provided both the following conditions are met:

- (a) the client has consented to receiving the suitability statement without undue delay after the conclusion of the transaction; and*
- (b) the investment firm has given the client the option of delaying the transaction in order to receive the statement on suitability in advance.*

*Where an investment firm provides portfolio management or has informed the client that it will carry out a periodic assessment of suitability, the periodic report shall contain an updated statement of how the investment meets the client's preferences, objectives and other characteristics of the **retail client**."*

[emphasis added]

1.20 There are a couple of key takeaways in this drafting:

- (a) the first sub-paragraph applies to investment firm's dealing and reporting obligations owed to **all** clients where a service is provided to that client, (in keeping with the principle that existed in Art 19(8) MiFID I), whereas sub-paragraphs two and four apply to only those that are categorised as retail clients. It is unlikely that paragraphs two and four would apply to the bulk of SFT activity but they may, in limited circumstances, such as portfolio management carried out for retail clients apply to agency lenders; and
- (b) the first sub-paragraph of Art. 25(6) MiFID II, which applies in the context of where the investment firm is providing *investment advice* to a client, in particular the part emphasised herein in bold requires that the investment firm report preparer take into account the complexity of the financial instrument and the information needs of the client. Consequently, those investment firms that are required to comply with this obligation when preparing reports,

may want to evaluate and document the information needs of the given client and the familiarity with the transactions i.e., SFT activity and obtain consent that the Art. 25(6) MiFID II and Art. 59 DR reporting obligations are satisfied by the transaction confirmation. If an investment firm is not providing investment advice to a client, then this sub-paragraph is unlikely to apply.

1.21 Art. 59 DR

This article supplements Art. 25(6) MiFID II. It applies to "*reporting obligations in respect of execution of orders other than for portfolio management.*" Art. 59 DR reads as follows:

"1. *Investment firms having carried out an order [i.e., a transaction] on behalf of a client, other than for portfolio management, shall, in respect of that order:*

- (a) *promptly provide the client, in a durable medium, with the essential information concerning the execution of that order;*
- (b) *send a notice to the client in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.*

Point (b) shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.

Points (a) and (b) shall not apply where orders executed on behalf of clients relate to bonds funding mortgage loan agreements with the said clients, in which case the report on the transaction shall be made at the same time as the terms of the mortgage loan are communicated, but no later than one month after the execution of the order.

- 2. ***In addition to the requirements under paragraph 1, investment firms shall supply the client, on request, with information about the status of his order.***
- 3. *In the case of client orders relating to units or shares in a collective investment undertaking which are executed periodically, investment firms shall either take the action specified in point (b) of paragraph 1 or provide the client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.*
- 4. ***The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with the regulatory technical standards on reporting obligations adopted in accordance with Article 26 of Regulation (EU) No 600/2014:***
 - (a) *the reporting firm identification;*
 - (b) *the name or other designation of the client;*
 - (c) *the trading day;*
 - (d) *the trading time;*

- (e) the type of the order;*
- (f) the venue identification;*
- (g) the instrument identification;*
- (h) the buy/sell indicator;*
- (i) the nature of the order if other than buy/sell;*
- (j) the quantity;*
- (k) the unit price;*
- (l) the total consideration;*
- (m) a total sum of the commissions and expenses charged and, where the client so requests, an itemised breakdown including, where relevant, the amount of any mark-up or mark-down imposed where the transaction was executed by an investment firm when dealing on own account, and the investment firm owes a duty of best execution to the client;*
- (n) the rate of exchange obtained where the transaction involves a conversion of currency;*
- (o) the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;*
- (p) where the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.*

For the purposes of point (k), where the order is executed in tranches, the investment firm may supply the client with information about the price of each tranche or the average price. Where the average price is provided, the investment firm shall supply the client with information about the price of each tranche upon request.

5. *The investment firm may provide the client with the information referred to in paragraph 4 using standard codes if it also provides an explanation of the codes used."*

[emphasis added]

1.22 Following on from the key takeaways in the drafting in relation to the Art. 25(6) MiFID II compliance obligations, in relation to Art. 59 DR this means, taking this in turn, that both Dealer A and Dealer B would have:

- (a) where a Dealer is acting as agent for a Principal, obligations to comply with Art. 59(1)(a) and (b) and provide each of their Principals, as the respective Dealer's "client" with the information set out in Art. 59(4) DR;

- (b) where Dealer B is acting as agent, in the event that COBS 2.4.3 R (to the extent it applies) yields that Dealer B (as C1) is the client of Dealer A (as F) then Dealer A would have to provide the relevant information to Dealer B if Dealer A is considered to be providing a service to Dealer B or executing an order on behalf of Dealer B;
- (c) in the event that COBS 2.4.3 R (to the extent it applies) yields - for instance by a specific agreement between the parties - that Principal 2 (as C2) is the client of Dealer A (as F) then Dealer A would have to provide the relevant information to Principal 2 to the extent that:
 - (i) if Dealer A is considered to be providing a service to Principal 2 or executing an order on behalf of Principal 2, and
 - (ii) the second paragraph of Art. 59(1)(b) does not apply i.e., Dealer B has already provided "*...the same information as a confirmation...*" dispatched by "*...another person...*" i.e., Dealer B to Principal 2; and
- (d) Art. 59(5) DR permits that information may be provided electronically. As a result, one might consider whether this data, which Dealer A or Dealer B, should have when applying this to a hypothetical SFT relationship and exposure, including in the agency lending context, could be pushed to an account that is accessible by the respective client or, to the extent a Principal is designated as client, that Principal.

1.23 The regulatory principles behind Art. 25(6) MiFID II and Art. 59 DR have existed in the MiFID I obligations (Art. 19(8) thereof) yet the MiFID II and DR obligations are more prescriptive as to what needs to be reported to "clients". These regulatory obligations may lead to a certain degree of duplication of such information that has already been provided by each of Dealer A and B to their respective clients i.e. Principals 1 and 2. It may also duplicate exchange of information to the extent it is already provided between the street counterparties to a GMSLA.

1.24 The drafting in the MiFID II/MiFIR Framework only requires that MiFID investment firms provide the required data, applying a requisite degree of skill and care in its provision, and are thus under no EU regulatory obligation to ensure that the data is actually received.

1.25 It should be noted that in the scenarios described in paragraph 1.22 above that in the event that both Dealer A and B are transacting with one another as "street counterparties" i.e., acting in their own capacity as principals and thus without clients, then the client reporting obligations in Art. 25(6) MiFID II and Art. 59 DR are unlikely to apply to that specific relationship. In summary, Investment firms will also need to consider whether they view themselves as carrying out an order (transaction) on behalf of another investment firm, or providing investment services to another investment firm, when those investment firms face each other in an SFT (e.g. 'street facing activity'). This will be a fact specific decision for each investment firm, and beyond the scope of this memorandum, but in circumstances where an investment firm is not carrying out an order for, or providing an investment service to, its counterparty, then prima facie the obligations in Art 25(6) MiFID II and Art. 59 DR would not apply.

2. Possible solutions

2.1 MiFID II investment firms will need to determine whether their activities are in scope or out of scope for Art 25(6) MiFID II and Art. 59 DR. This will require the investment firms to review their activities, taking into account the classification of their counterparty, who is the 'client', whether the

investment firm is providing any services to or executing orders/transactions on behalf of that client, and other matters they consider relevant. This will necessarily be a fact specific exercise for each investment firm, and for its various counterparties and activities.

- 2.2 If investment firms conclude that Art 25(6) MiFID II and Art. 59 DR do apply to a particular SFT relationship or activity, for instance where that investment firm is providing services to, or executing orders in respect of, SFTs for its clients, the requirements imposed on firms do however duplicate a number of items that may already be communicated in transaction confirmations or other information already provided or made available by the investment firm to its client (for example any confirmation exchanged between the parties to a GMSLA). In order to avoid duplication and to achieve compliant solutions, if market participants take the view that their activities are in scope for purposes of Art. 25(6) MiFID II and Art. 59 DR then they may wish to discuss, with both their SFT counterparties (i.e. their 'street counterparties'), whom we assume will not be categorised as retail clients and for those commercial counterparties/clients (some of whom might be categorised as retail clients) to assess the following as possible solutions that can be progressed:
- (a) do the relevant SFT counterparties have sufficient access to and are they respectively providing information to commercial counterparties/clients, in particular retail clients who benefit from the protections in Art. 25(6) MiFID II and Art. 59 DR or do additional measures need to be taken to facilitate information that is required to be reported is adequately made available by one or each of the street counterparties to the respective commercial counterparties/clients?; and
 - (b) develop a standalone bilateral document (the **Art. 59 Reporting Obligation Letter**) that users of a GMSLA may execute or incorporate as a binding agreement clarifying that bilateral transactions given pursuant to a GMSLA (and possibly legacy securities lending documentation), including as amended by a master confirmation agreement, or such other arrangement having similar effect (such as a market standard protocol, annex or language to be inserted into master agreements or confirmations), that satisfies the reporting obligations and the information to be delivered pursuant to Art. 25(6) MiFID II and Art. 59 DR and that this meets:
 - the information needs requirements of the client in light of its MiFID client categorisation status;
 - the complexity of the transaction (i.e., the SFT); and
 - the client's familiarity with these types of transaction.

3. Next steps

- 3.1 We would be delighted to discuss these points, or indeed any of the contents in this memorandum with individual ISLA Members on a further conference call prior to discussing what proposed solutions could be advanced.
- 3.2 We trust that the above might help in order to steer the conversation with ISLA Members but please do let us know should you wish to discuss any of the contents above or whether we can start preparing the proposed solutions.

Yours sincerely

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ⁱ See: COBS 3.1 and FCA Glossary Definition for "client" which at the time of writing 1.12.2017 meant (emphasis added in bold in relation to agency lending):

(A) in the *PRA Handbook*:

(1) (except in *PROF* and except in relation to a *home finance transaction*) has the meaning given in *COBS 3.2*, that is (in summary and without prejudice to the detailed effect of *COBS 3.2*) a *person* to whom a *firm* provides, intends to provide or has provided a service in the course of carrying on a *regulated activity*, or in the case of *MiFID or equivalent third country business*, an *ancillary service*;

(a) every client is a *customer* or an *eligible counterparty*;

(b) "client" includes:

(i) a potential client;

(ii) a client of an *appointed representative* of a *firm* with or for whom the *appointed representative* acts or intends to act in the course of business for which the *firm* has accepted responsibility under section 39 of the *Act* (Exemption of appointed representatives) or, where applicable, a client of a *tied agent* of a *firm*;

(iii) a *fund* even if it does not have separate legal personality;

(iiiA) any *person* to whom *collective portfolio management* services are provided, irrespective of whether or not it is *authorised*;

(iv) if a *person* ("C1"), with or for whom the *firm* is conducting or intends to conduct *designated investment business*, is acting as agent for another *person* ("C2"), either C1 or C2 in accordance with the *rule* on agent as client *COBS 2.4.3 R*;

(v) for a *firm* that is *establishing, operating or winding up a personal pension scheme*, a member or beneficiary of that scheme;

(c) "client" does not include:

(i) a trust beneficiary not in (b)(vi);

(ii) a *corporate finance contact*;

(iii) a *venture capital contact*.

(2) [deleted]

(3) (in *PROF*) (as defined in section 328(8) of the *Act* (Directions in relation to the general prohibition)) (in relation to *members* of a profession providing financial services under Part XX of the *Act* (Provision of Financial Services by Members of the Professions)):

(a) a *person* who uses, has used or may be contemplating using, any of the services provided by the *member* of a profession in the course of carrying on *exempt regulated activities* (including, where the *member* of the profession is acting in his capacity as a trustee, a *person* who is, has been or may be a beneficiary of the trust); or

(b) a *person* who has rights or interests which are derived from, or otherwise attributable to, the use of any such services by other *persons*; or

(c) a *person* who has rights or interests which may be adversely affected by the use of any such services by *persons* acting on his behalf or in a fiduciary capacity in relation to him.

(4) (in relation to a *regulated mortgage contract*, except in *PROF*) the individual or trustee who is the borrower or potential borrower under that contract.

(5) (in relation to a *home purchase plan*, except in *PROF*) the *home purchaser* or potential *home purchaser*.

(6) (in relation to a *home reversion plan*, except in *PROF*):

(a) the *reversion occupier* or potential *reversion occupier*; or

(b) an individual who is an *unauthorised reversion provider* and who is not, or would not, be required to have *permission* to *enter into a home reversion plan*.

(7) (in relation to a *dormant account* transferred to a *dormant account fund operator*) a *person* entitled to the *balance* in the *dormant account* held with a *bank* or *building society* which was transferred to a *dormant account fund operator*.

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- (8) (in relation to a *regulated sale and rent back agreement*, except in *PROF*):
- (a) the individual or trustee who is the *SRB agreement seller* or potential *SRB agreement seller*; or
 - (b) an individual who is an *unauthorised SRB agreement provider* or potential *unauthorised SRB agreement provider* and who does not have, or would not be required to have, *permission* to *enter into a regulated sale and rent back agreement*.

(B) in the *FCA Handbook*:

- (1) (except in *PROF*, in relation to a *credit-related regulated activity* and in relation to a *home finance transaction*) has the meaning given in *COBS 3.2*, that is (in summary and without prejudice to the detailed effect of *COBS 3.2*) a *person* to whom a *firm* provides, intends to provide or has provided a service in the course of carrying on a *regulated activity*, or in the case of *MiFID or equivalent third country business*, an *ancillary service*:
- (a) every client is a *customer* or an *eligible counterparty*;
 - (b) "client" includes:
 - (i) a potential client;
 - (ii) a client of an *appointed representative* of a *firm* with or for whom the *appointed representative* acts or intends to act in the course of business for which the *firm* has accepted responsibility under section 39 of the *Act* (Exemption of appointed representatives) or, where applicable, a client of a *tied agent* of a *firm*;
 - (iii) a *fund* even if it does not have separate legal personality;
 - (iv) any *person* to whom *collective portfolio management services* are provided, irrespective of whether or not it is *authorised*;
 - (v) if a *person* ("C1"), with or for whom the *firm* is conducting or intends to conduct *designated investment business*, is acting as agent for another *person* ("C2"), either C1 or C2 in accordance with the rule on agent as client *COBS 2.4.3 R*;**
 - (vi) for a *firm* that is *establishing, operating or winding up a personal pension scheme*, a member or beneficiary of that scheme;
 - (c) "client" does not include:
 - (i) a trust beneficiary not in (b)(v);
 - (ii) a *corporate finance contact*;
 - (iii) a *venture capital contact*.
- (2) (in *PROF*) (as defined in section 328(8) of the *Act* (Directions in relation to the general prohibition)) (in relation to *members* of a profession providing financial services under Part XX of the *Act* (Provision of Financial Services by Members of the Professions)):
- (a) a *person* who uses, has used or may be contemplating using, any of the services provided by the *member* of a profession in the course of carrying on *exempt regulated activities* (including, where the *members* of the profession is acting in his capacity as a trustee, a *person* who is, has been or may be a beneficiary of the trust); or
 - (b) a *person* who has rights or interests which are derived from, or otherwise attributable to, the use of any such services by other *persons*; or
 - (c) a *person* who has rights or interests which may be adversely affected by the use of any such services by *persons* acting on his behalf or in a fiduciary capacity in relation to him; and
 - (d) in relation to a *person* ("A") carrying on a *regulated activity* of the kind specified by article 39F (Debt-collecting) or 39G (Debt administration) of the *Regulated Activities Order*, includes:
 - (i) the *borrower* under the *credit agreement* or the *hirer* under the *consumer hire agreement*;
 - (ii) someone who has been the *borrower* or *hirer* under the agreement;
 - (iii) a *person* who is treated by A as a *person* falling within (i) or (ii);
 - (iv) any *person* providing a guarantee or indemnity under the agreement; and
 - (v) a *person* to whom the rights and duties of a *person* falling within (iv) have passed by assignment or operation of law; and

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- (e) in relation to a *person* ("A") carrying on a *regulated activity* of the kind specified by article 60B (regulated credit agreements) or article 60N (regulated consumer hire agreements) of the *Regulated Activities Order*, includes a *person* who is treated by A as a person who is or has been:
- (i) the *borrower* under a *regulated credit agreement* or the *hirer* under a *regulated consumer hire agreement*;
 - (ii) a *person* providing a guarantee or indemnity under the agreement; or
 - (iii) a *person* to whom the rights and duties of a *person* within (ii) have passed by assignment or operation of law; and
- (f) includes an *individual* who is, may be, has been or may have been the subject of the information referred to in article 89A (Providing credit information services) of the *Regulated Activities Order*; and
- (g) includes an *individual* who is, may be, has been or may have been the subject of information furnished in the course of a *person* carrying on an activity of the kind specified by article 89B (Providing credit references) of the *Regulated Activities Order*.
- (3) in relation to a *regulated mortgage contract*, except in *PROF*) the individual or trustee who is the borrower or potential borrower under that contract.
- (4) in relation to a *home purchase plan*, except in *PROF*) the *home purchaser* or potential *home purchaser*.
- (5) (in relation to a *home reversion plan*, except in *PROF*):
- (a) the *reversion occupier* or potential *reversion occupier*; or
 - (b) an individual who is an *unauthorised reversion provider* and who is not, or would not, be required to have *permission* to *enter into a home reversion plan*.
- (6) (in relation to a *dormant account* transferred to a *dormant account fund operator*) a *person* entitled to the *balance* in the *dormant account* held with a *bank* or *building society* which was transferred to a *dormant account fund operator*.
- (7) (in relation to a *regulated sale and rent back agreement*, except in *PROF*):
- (a) the individual or trustee who is the *SRB agreement seller* or potential *SRB agreement seller*; or
 - (b) an individual who is an *unauthorised SRB agreement provider* or potential *unauthorised SRB agreement provider* and who does not have, or would not be required to have, *permission* to *enter into a regulated sale and rent back agreement*.
- (8) (in relation to a *credit-related regulated activity*) a *customer*.