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CLIFFORD CHANCE PRIVATE FUNDS UPDATE: JANUARY 2020

Welcome to the January 2020 edition of our private funds update. This briefing is intended to give you a short update on key legal, tax and regulatory developments relevant to private fund managers, drawing on expertise from across our Global Funds & Investment Management practice. If you would like to know more about a particular development, please get in touch with any of the contacts listed at the end of this update.

Brexit – the latest

After the Brexit-related twists and turns of 2019, you could be forgiven for not noticing that the UK is poised to quietly exit from the EU. Since the December election, an end of January withdrawal has seemed an inevitability, and the passage of the European Union (Withdrawal Agreement) Act through the UK House of Commons and House of Lords received less UK press attention than "Megxit". Regardless, 'Brexit' is now a reality, and – as of midnight CET on 31 January 2020 – the UK is no longer a member of the EU.

What happens now?

In the immediate term, the departure from the EU simply triggers the start of a "transition period" running to 31 December 2020, during which the UK will no longer be a member of the EU but will continue to remain a member of the single market and customs union, and to be subject to EU rules (including any new laws implemented during the transition period). This is intended to allow a "business as usual" period in which the UK can negotiate its future trading relationship with the EU. Access to European passporting rights (including the AIFMD marketing passport) will remain available to UK persons for the duration of the transition period and a European fund can be passported into the UK as if it were still an EU member state.

Managers and others engaged in the asset management industry may therefore take some comfort in the short term that the rights they enjoy will continue to remain available to them for the remainder of 2020, and that limited or no changes will be required to be made to legal documentation or structures for the purposes of the transition period itself. Definitions of, and references to, EU Member States may need to be adjusted to refer to remaining EU Member States and the UK, and contractual references to the EU as a geographical area may need updating to address the UK as a separate territory, but EU legislative references can remain unchanged and further substantive changes are unlikely to be required.

However, whilst the UK may have withdrawn from the EU, it remains largely unclear what the UK's future relationship with the EU may look like. The stated aim of the UK is to reach an agreement with the EU for duty and quota-free trade, but with the freedom to diverge from EU rules. The EU's position on the other hand is that such duty and quota-free access to its market may only be granted if a "level playing field" across a wide range of policies and laws is ensured (i.e., restricting the UK's ability to diverge). This is a recipe for discontent. Moreover, while the ca. 30 page political declaration agreed between the EU and the UK as a basis for future negotiations is unusual in including a specific section on financial services, the content is limited and simply suggests normal third party treatment, not closing off the possibility of further enhancement but not offering it either.

A difficult starting point for negotiations is arguably further exacerbated by the short timeframe in which the agreement must be reached to avoid a no-deal exit. As noted above, the transition period is scheduled to end on 31 December 2020, and any further extensions of this period have been statutorily restricted within the Withdrawal Act (such that a full amendment to the Act would be required to permit one). For comparative purposes, it recently took seven years for the EU and Canada to negotiate a relatively straightforward trade deal, and three years for the EU to negotiate a trade deal when Greenland (with a population equivalent to Uxbridge in the UK) withdrew from the EU in 1985. Failing to reach such an agreement during the transition period would, however, lead to another "cliff edge" no-deal scenario.

It would therefore be prudent to continue to prepare for the end of the transition period, and for the potential of a no-deal exit. From a legal and fund structuring perspective, this would include ensuring that documentation and structures are resilient to a UK that is outside of the EU and not subject to EU rules – for example, by confirming that jurisdiction clauses would continue to operate and that legislative references would remain workable.

The new EU prudential regime for investment firms – impact on asset managers

The EU is introducing a new harmonised prudential regime for EU investment firms under the Investment Firms Directive ("**IFD**") and Investment Firms Regulation ("**IFR**"), which were published in the Official Journal on 5 December 2019 and will start to apply from 26 June 2021. Asset managers caught by the new regime will need to act now to prepare for the application of these new requirements.

This new prudential regime will apply to most EU investment firms (with the exception of the largest and systemically important investment firms, which will continue to be treated as, or as if they were, credit institutions), including EU portfolio managers and investment advisors that are authorised as MiFID investment firms. It will also be relevant to AIFMs and UCITS managers with MiFID top-up permissions where they are currently subject to certain provisions of CRD IV and CRR. Once the new regime starts to apply, CRD IV and CRR will cease to apply to these AIFMs or UCITS managers and the recitals to the IFD therefore indicate that the references in AIFMD and the UCITS Directive to CRD IV and CRR should be construed as references to the corresponding provisions in the IFD and IFR.

Although this new prudential regime does not strictly apply to AIFMs and UCITS (other than as set out above), the practical impact may depend on national implementation and we might see the IFD and IFR used as a blueprint for any revised AIFM or UCITS manager regulatory capital requirements in the future.

For asset managers falling within scope of the new regime, the IFD and IFR will introduce significant changes to the prudential requirements that currently apply to them. Small, non-interconnected firms ("**Class 3 firms**") will be subject to a simplified version of the regime, whilst other firms ("**Class 2 firms**") will be subject to an entirely new and potentially challenging 'K-factor' approach to assessing capital requirements as well as new consolidation, reporting, governance and remuneration requirements.

The IFD sets new initial capital requirements for investment firms according to their authorised activities (with a €75,000 initial capital requirement for firms carrying on portfolio management and investment advice but which do not deal on own account, carry on underwriting or placing on a firm commitment basis or operate an MTF or OTF). Class 2 firms will be subject to risk-based regulatory capital requirements on an ongoing basis, assessed as the higher of the sum of their 'K-factor' requirements, one-quarter of their annual fixed overheads and their initial capital requirement. Class 3 investment firms' capital requirements will be the higher of one-quarter of their annual fixed overheads and their base capital requirement. They will not have to assess their capital based on the K-factors (but will have to be able to monitor some of the data required by the K-factors in order to assess whether they become Class 2 investment firms).

The 'K-factor' requirements themselves are based on various metrics, including assets under management, which captures both discretionary portfolio management and investment advisory activities. Assessing capital requirements based on these new metrics will be a challenge, as they depart radically from the current regime. This is in some ways to be expected — the whole point of the IFD/IFR is to move away from the old standards. However, firms and groups will need to reassess their data collection, reporting and analysis systems and processes, and this process needs to start soon, so that firms are ready in time, and have sufficient historical data to comply with the new regime.

The regime will also introduce various other prudential requirements, including:

- a basic liquidity requirement, calibrated at one-third of annual fixed overheads, and which must be met with cash and other high-quality liquid assets (although Class 3 firms will be able to treat a wider range of assets as liquid assets for these purposes and competent authorities may exempt them from this liquidity requirement altogether);
- public disclosure requirements similar to the Pillar 3 disclosure requirements applicable to credit institutions;
- remuneration requirements similar to those applicable to credit institutions (both on an individual and group-wide basis);
- internal capital and liquidity adequacy assessment processes (ICAAP/ILAAP) and internal governance processes for treatment of risks (for Class 2 firms only); and
- an increased role for supervisors, including supervisory review and evaluation process (SREP) requirements and the possibility for supervisors to impose supplementary Pillar 2 capital and liquidity requirements on firms.

The European Supervisory Authorities are tasked with delivering draft technical standards to the European Commission which – when adopted and effective – will specify many of the requirements in IFR and IFD. However, the IFR and IFD only require delivery of these drafts to the Commission 12 or 18 months after the legislation enters into force. Therefore, there is a significant risk that firms will be required to implement the new regime before (or only soon after) finalisation of many of the technical standards. This will create additional implementation challenges for firms, unless in the end there are legislative amendments to delay the application date.

The new regime is due to apply from 26 June 2021. Nevertheless, asset managers falling within scope of the IFD and IFR will need to begin considering now the systems and controls they will need to implement in order to assess their status under the new regime and, where relevant, to comply with these new capital, consolidation, reporting, governance and remuneration requirements.

Stewardship reform

The UK Financial Reporting Council ("**FRC**") has produced a revised version of its UK Stewardship Code (the "**Code**"), which is a substantial revision to the 2012 edition of the Code, and took effect on 1 January 2020. As was the position with respect to the 2012 Code, becoming a signatory to the new Code is voluntary, but is underpinned by COBS 2.2.3R of the FCA Handbook, which requires firms that manage investments to disclose on their website the nature of their commitment to the Code or, where they do not commit to the Code, their alternative investment strategy.

The purpose of the new Code is to set high expectations for stewardship practice, increase transparency and create an effective market for stewardship. Key changes from the 2012 Code include the following:

- The new Code consists of 12 'apply and explain' Principles for asset managers and asset owners, and six separate Principles for service providers, which are supported by reporting expectations. This is a departure from the 2012 Code, under which seven principles were applied on a 'comply or explain' basis. The new Code therefore presents an additional compliance burden.
- The new Code contains a revised definition of stewardship as follows: "Stewardship is the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society". This revised definition represents a broader focus and purpose for stewardship beyond simply benefitting companies, investors and the economy (as was the case under the 2012 Code's definition).
- The new Code applies to a range of asset classes beyond listed equity, such as fixed income bonds, private equity, real estate and infrastructure, recognising the significant growth in investment in these assets since the 2012 Code was introduced.
- The new Code is focused on the activities and outcomes of stewardship (as opposed to focusing on policy statements, as per the 2012 Code), and contains new expectations about how investment and stewardship is integrated, including environmental, social and governance (ESG) issues. This reflects the fact that issues such as climate change have become material issues for investment decision-making.

Firms that wish to become signatories to the new Code must produce an annual Stewardship Report explaining how they have applied the Code over the previous 12 months. Firms will remain signatories to the 2012 Code until the first list of signatories to the new Code is published. To be included in the first list of signatories to the Code, firms must submit a final report to the FRC by 31 March 2021.

The FRC's new Code is not the only initiative being implemented to promote a more long-term perspective in investment activity. Increasing policy interest in stewardship is one of the UK FCA's priorities for 2020, as is evident by the number of its regulatory initiatives pursuing this aim, for example the FCA's rules implementing SRD II (further details on the implementation of SRD II can be found in our previous Private Funds Update, which is available here), and the FCA's related work on climate change and green finance. In addition, beyond the UK, institutions such as the European Commission are also working on initiatives such as the EU Sustainable Finance Action Plan, which contains a number of stewardship-related proposals including, for example, the introduction of legislation such as the Disclosure Regulation, and ESMA's consultation on short-termism in financial markets. Further details on the various actions under the EU Sustainable Finance Action Plan can be found in our publication "Growing the Green Economy: Addressing the Sustainability Challenges and Opportunities".

Clearly, a key challenge for firms in navigating this new era of increased focus on stewardship will be considering how to integrate all these additional, and potentially overlapping, regulatory requirements into their systems and reporting practices.

Operational resilience

Operational resilience has been a significant focus of the regulatory agenda for 2019 and is set to remain so for 2020, having been identified as a clear priority in the UK FCA's Business Plan 2019/20.

The FCA first published a joint Discussion Paper with the PRA and the Bank of England on operational resilience in July 2018. The Discussion Paper stated that operational disruption can affect the stability of the UK financial framework, threaten the viability of individual firms, and cause harm to other market participants, and that firms needed to consider all of these risks when assessing the appropriate levels of resilience within their respective businesses. Operational resilience, therefore, is actually an outcome, described as the ability of firms and the financial sector as a whole to prevent, adapt, respond to, recover and learn from operational disruptions.

On 5 December 2019 the FCA, PRA and the Bank of England published a shared policy summary and co-ordinated consultation papers on new requirements to strengthen operational resilience in the financial services sector. The FCA's Consultation Paper expands on and develops the ideas proposed in the Discussion Paper, based on industry feedback.

The Consultation Paper applies to, amongst others, banks, building societies, Solvency II firms, and Enhanced scope SM&CR firms (i.e., firms with assets under management of £50 billion or more as a three year rolling average, or firms that opt to apply the Enhanced regime). In practice, therefore, many asset managers may fall outside the scope of these proposed new requirements.

Under the Consultation Paper, the FCA is proposing that in-scope firms:

- **Identify their important business services** that, if disrupted, could cause harm to consumers or market integrity
- Identify and document the people, processes, technology, facilities and information that support a firm's important business services (**mapping**)
- **Set impact tolerances** for each important business service (i.e., thresholds for maximum tolerable disruption)
- **Test** their ability to remain within their impact tolerances through a range of severe but plausible disruption scenarios
- **Conduct lessons learned exercises** to identify, prioritise and invest in their ability to respond and recover from disruptions as effectively as possible
- Develop internal and external **communications plans** for when important business services are disrupted
- Create a **self-assessment document**

The FCA has developed these policy proposals and the underlying draft rules in the context of the existing UK and EU regulatory framework.

Potential challenges for in-scope asset managers in implementing the policy proposals include:

- The disruption risks faced by asset managers may be qualitatively and quantitatively different from those faced by other institutions such as investment banks or insurance firms
- There is no 'one-size-fits-all' approach – planning should correlate to the services operating within the firm and their associated disruption risks

Any comments on the CP must be received by the FCA by 3 April 2020, following which the FCA will publish final rules in a Policy Statement.

SEC proposes amendment to modernise advertising rule with "principles-based" approach

On November 4, 2019, the US Securities and Exchange Commission (the "**SEC**") proposed amendments to Rule 206(4)-1 (the "**Advertising Rule**") under the Investment Advisers Act of 1940, as amended. The proposed amendments are intended to provide a "principles-based" approach which would replace the broadly-drawn limitations of the current Advertising Rule to better adapt its requirements to ever-changing investor expectations, market practice and communications technology. While the amended Advertising Rule would continue to apply only to registered investment advisers, exempt reporting advisers should consider any changes in general market practice and investor expectations that result from the proposed amendments.

The proposed amendments would revise the definition of "advertisement" to include any communication "that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment

adviser." The amended Advertising Rule would expressly cover communications with private fund investors, but the definition of "advertisement" would exclude advertisements and sales literature relating to mutual funds and other registered investment companies. Additionally, the amended Advertising Rule would, for the first time, distinguish between "retail" and "non-retail" clients and investors to provide for less stringent requirements with respect to advertisements distributed only to "non-retail" clients and investors. Other proposed changes include, but are not limited to, additional general advertising prohibitions (and certain tailored restrictions and requirements) intended to give effect to the principles of the amended Advertising Rule that require references to performance results to be "fair and balanced", removal of the general ban on testimonials, endorsements, and third-party ratings if specified disclosures are made, and new compliance and recordkeeping requirements for advisers. The SEC is proposing a one-year transition period beginning on the effective date of the proposed amendments as adopted, and would allow advisers to rely on the amended Advertising Rule as soon as they are able to comply with its conditions.

5MLD comes into force in the UK

On 10 January 2020, the majority of the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 ("**MLRs 2019**") came into force, amending the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("**MLRs 2017**", and together with MLRs 2019, the "**MLRs**"). The MLRs 2019 transpose the Fifth Money Laundering Directive ("**5MLD**") into UK law.

Key New Requirements

Firms should take particular note of the new requirements that the FCA highlights on its new webpage, which are:

- the requirements to include new additional high-risk factors when assessing the need for enhanced due diligence, and seek additional information and monitoring in certain cases;
- the reduction in the monetary threshold for identifying the holders of prepaid cards;
- the requirements for firms to update their records with the beneficial ownership of corporate clients;
- the requirements for firms to report to Companies House any discrepancies between the information the firm holds on their customers compared with the information held in the Companies House Register; and
- the requirements to respond to requests for information about account holders, via the central automated mechanism.

Reporting discrepancies to Companies House

Regulation 30A sets out a new requirement to check trust and company beneficial ownership registers before establishing a business relationship. Relevant persons must then report to Companies House any discrepancies between the information on a beneficial owner which becomes available to them in the course of carrying out their duties under the MLRs, and the information on the Companies House People with Significant Control (PSC) Register. An important point for managers to note is that 'beneficial owner' does not have the same definition as a PSC. Companies House has published guidance to assist with this new reporting requirement, which highlights that the requirement to report discrepancies is based on the Companies Act definition of a PSC.

Timing

The MLRs 2019 were published on 20 December 2019 and came into force on 10 January 2020, except for: (i) Regulation 5(5)(c) regarding conditions for acquirers accepting anonymous prepaid cards issued in a third country, which comes into force on 10 July 2020; and (ii) Regulations 6 and 12 (on the automated mechanism for identifying holders of accounts and safe deposit boxes and extending the list of "relevant requirements" for enforcement purposes, respectively), which come into force on 10 September 2020.

The MLRs 2019 do not include the new trust registration requirements under 5MLD. On 23 January 2020, HM Treasury published its response to the April 2019 consultation on implementing 5MLD, following which the Government announced that it had launched a further detailed technical Consultation on expansion of the trust registration requirements, which includes the draft legislation and proposals on the types of express trusts that will be required to register, data collection and sharing, and penalties. This consultation closes on 21 February 2020.

On the new webpage, the FCA states that it expects firms to comply with the new obligations from 10 January 2020. However, given the short implementation period, the FCA also states that in assessing its approach to firms that may not be compliant on that date, it will take into account evidence that they have taken sufficient steps before that date to comply.

The transition away from IBORs and its impact on private funds

The demise of LIBOR (London Interbank Offered Rate) and other IBORs (interbank offered rates) has been on the agenda for some years, but regulatory pressure (particularly on sell-side entities) and market initiatives will result in structural market changes which will impact private funds. IBOR transition will impact private funds which are borrowing, lending and hedging in a range of currencies, as well as those originating for securitised debt and using other capital markets instruments. Indeed, IBORs are such universal and pervasively used interest rate benchmarks, you will find them being used across your business, for example in limited partnership agreements, trading models and ordinary commercial contracts. Private funds need to be planning for the day that relevant IBORs cease to be published.

What is happening?

In the wake of rate-fixing scandals, the financial markets are being strongly encouraged to move from using IBORs as reference rates to "risk-free reference rates" ("**RFRs**"). For example, the RFR replacement rate for LIBOR will be SONIA. Regulators view RFRs as more robust because they are less open to manipulation and are more representative of the rates actually being transacted in the market. The transition away from IBORs to RFRs is already happening in some markets for new products and the pace will pick up as some IBORs may cease to be published after the end of 2021. However, an RFR does not represent a seamless replacement for an IBOR. An RFR rate is lower than its corresponding IBOR (because the RFR is an overnight rate which does not embed the credit risk element reflected in an IBOR) and an RFR is also not a forward-looking term rate like an IBOR (although forward-looking term RFR rates are being considered).

The impact on new business – for new transactions being entered into with a tenor beyond 2021, RFR-based rates may soon become the new norm. This needs to be factored into funds' documentation, modelling, IT and systems. You should also be considering the point at which your fund should be actively choosing to move away from IBOR based products. The move to RFRs should not be implemented on a product-by-product basis, but a holistic view must be taken across your business. For example, if you borrow in LIBOR but hedge the interest rate risk under that loan using SONIA, there will be a mismatch. Coordination across the business is key.

Legacy business – regulators and market participants are now acutely aware of the large amount of transactions which will span the potential cessation of IBOR publication and which do not contain adequate provisions dealing with the permanent cessation of IBOR publication. As such, funds should expect client outreach programmes to commence this year seeking to amend loans, bonds, securitisations, derivatives and other products to include so-called "fallbacks" providing for a switch from IBOR to RFR-based rates. Funds should ensure they understand the practical, legal and economic impacts of such amendments. The changes are highly likely to impact the value of the products being amended. As for new business, funds should take a holistic view to amendments to legacy business and consider how the approach being taken in one market differs from others.

ILPA model limited partnership agreement

The Institutional Limited Partners Association ("**ILPA**") released a model limited partnership agreement (the "**Model LPA**") in October 2019, with a view to publicising a standard set of fund terms which embody ILPA's Principles 3.0, published earlier in 2019. The Model LPA envisages a European style 'whole-of-fund' waterfall, although ILPA also intends to produce an alternate Model LPA in due course offering the more traditionally GP-favoured US style 'deal-by-deal' waterfall. ILPA has also produced a Model Subscription Agreement.

ILPA hopes that the impact of the Model LPA will be to promote uniform terms across fundraisings and reduce reliance on side letters. This in turn is hoped to streamline the process of negotiating fund investments, optimising fundraising costs ultimately borne by investors. However, the result of implementing a "most favoured nation" right that effectively applies to all investors (regardless of commitment size and timing) will restrict the ability of managers to offer large, early, or strategically important investors better or bespoke terms, which is often central to getting (particularly new) fundraisings off the ground.

Whilst emerging managers may find the Model LPA a helpful benchmark for terms vetted by the LP community, more established sponsors are unlikely to adopt this form for now – including because some have negotiated specific LPA terms over time which are in fact more LP-friendly. In the press release issued by ILPA accompanying the launch of the Model LPA, it acknowledged that the document accommodates a traditional private equity buyout fund formed in Delaware. Sponsors should therefore be mindful that some terms may not be appropriate for other strategies, or for sponsors managing multiple funds and accounts across different strategies. Regardless of manager buy-in, investors are expected to use the Model LPA as a guide to fund terms going forwards, and sponsors would be well-advised to be aware of the position taken in the Model LPA on various key terms.

For a more detailed summary of the noteworthy provisions of the Model LPA, please see our recent briefing.

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You can request full access by sending an email to **FMToolkit@cliffordchance.com**

SMCR Manager

The SMCR Manager is an interactive digital tool to assist clients with the implementation of the Senior Managers and Certification Regime.

The FCA Senior Managers and Certification Regime (SMCR) was first rolled out to banks in 2017. It will be extended to the rest of the UK financial services sector from 9 December 2019. Clifford Chance has leveraged the insights gained through advising banks on their SMCR implementation to develop the SMCR Manager, a compliance workflow product that will guide users through the application of SMCR and provide ongoing support for compliance following implementation.

For further information please visit www.cliffordchance.com/smcr or **smcr@cliffordchance.com.**

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Please contact **Tamsin Collins** if you would like further information.

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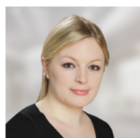
C L I F F O R D

C H A N C E

CONTACTS

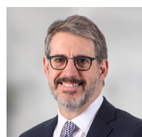
Nigel Hatfield
Partner
London
T: +44 20 7006 1834
E: nigel.hatfield@cliffordchance.com

Gerard Saviola
Partner
London
T: +44 20 7006 4958
E: gerard.saviola@cliffordchance.com

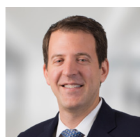


Alexandra Davidson
Partner
London
T: +44 20 7006 2581
E: alexandra.davidson@cliffordchance.com

Alexander Chester
Partner
London
T: +44 20 7006 8365
E: alexander.chester@cliffordchance.com



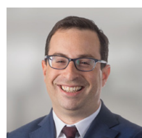
Jeff Berman
Partner
New York
T: +1 212 878 3460
E: jeff.berman@cliffordchance.com



Cliff Cone
Partner
New York
T: +1 212 878 3180
E: cliff.cone@cliffordchance.com

Michael Sabin
Partner
New York
T: +1 212 878 3289
E: michael.sabin@cliffordchance.com

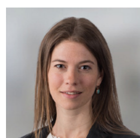
Fionnuala Oomen
Head of Strategy and Delivery, Funds
London
T: +44 20 7006 8392
E: fionnuala.oomen@cliffordchance.com



Michael Lyons
Partner
London
T: +44 20 7006 4317
E: michael.lyons@cliffordchance.com

Owen Lysak
Partner
London
T: +44 20 7006 2904
E: owen.lysak@cliffordchance.com

Will Winterton
Partner
London
T: +44 20 7006 4386
E: will.winterton@cliffordchance.com

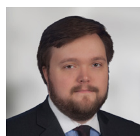


Laura Douglas
Senior Associate Konwledge Lawyer
London
T: +44 20 7006 1113
E: laura.douglas@cliffordchance.com

Lydia Drake
Lawyer
London
T: +44 20 7006 2270
E: lydia.drake@cliffordchance.com

Stephanie Dunne
Senior Associate
London
T: +44 20 7006 2812
E: stephanie.dunne@cliffordchance.com

Jacqueline Jones
Knowledge Director
London
T: +44 20 7006 2457
E: jacqueline.jones@cliffordchance.com



Andrew Nelson
Associate
New York
T: +1 212 878 8284
E: andrew.nelson@cliffordchance.com

Katy Seedhouse
Senior Associate
London
T: +44 20 7006 1165
E: katy.seedhouse@cliffordchance.com

Amy Watt
Senior Associate Konwledge Lawyer
London
T: +44 20 7006 1987
E: amy.watt@cliffordchance.com

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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