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Sara Woodroffe
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

By email: cp18-42@fca.org.uk

4 March 2019

Dear Ms Woodroffe

FCA CP18/42 - High-Cost Credit Review: Overdrafts consultation paper and policy statement

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We welcome the opportunity to respond to CP18/42, which sets out the FCA's proposals on reforming the way banks charge for overdrafts. CP18/42 also provides feedback and final rules in relation to CP18/13, which consulted on rules and guidance to help address low consumer awareness and engagement in the overdrafts market.

We have a particular concern as regards the scope of application of the proposed new rules on overdrafts. Certain of the new rules, as drafted, specifically do not apply to private banks. The same is true for certain of the proposals consulted on in CP18/13. However, the definition of a private bank employed by the FCA is worded in a manner such that it may exclude certain firms or brands commonly thought of as private banks. We do not believe this is an intentional policy decision, but rather an unintended consequence of the way in which a private bank is defined.

The FCA uses the following definition of a private bank:

> *"A private bank is a bank or building society or an operationally distinct brand of such a firm over half of whose personal current account customers are eligible individuals within the meaning of article 9 of the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (SI 2014/1960) or meet the condition in paragraph (3) of that article (see BCOBS 7.1.5G(2))."*

Therefore, over half of a bank's (or brand's) personal current account customers must meet the definition of "eligible individuals" in order for the firm or brand to be classed as a private bank for this purpose, and consequently excluded from the new rules.

The definition of "eligible individuals" broadly equates to individuals who have held assets to the value of not less than £250,000 over the previous twelve months. Assets in this context means assets calculated in accordance with Article 10 of the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014. The types of asset taken into account under Article 10 are (i) cash; and (ii) transferable securities, as defined in Article 4(1)(44) of the MiFID II Directive (Directive 2014/65/EU).

The MiFID definition of "transferable securities" is as follows:

> "*transferable securities" means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as—*
>
> *a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*
>
> *b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*
>
> *c) any other securities giving the right to acquire or sell any such securities or giving rise to a cash settlement determined by reference to such securities, currencies, interest rates or yields, commodities or other indices or measures;*

Therefore, where a private bank customer with assets of £250,000 holds his or her assets in cash and financial instruments, he or she will only qualify as an eligible individual if the non-cash assets are invested in transferable securities, not other types of financial instrument.

Our concern arises as we understand that many private bank customers typically will hold a significant proportion of their assets in collective investment schemes. While some assets will be held in listed investment trusts and exchange traded funds, which may qualify as transferable securities, most will be held in UCITS, AIFs and other funds, which are classed as units in collective investment undertakings under MiFID (and not transferable securities).

This has the result that many private bank clients with assets over £250,000 would not qualify as "eligible individuals". As such, some private banks will not meet the FCA's definition of a private bank and will not be exempt from the new rules on overdrafts. While we appreciate that the FCA will not want the definition of a private bank to be unduly broad, we cannot see that it was the policy intention to create such a narrow and restrictive category of banks that may benefit from the exemption.

We think this is also a matter of wider regulatory importance, since this definition of a private bank is already used in BCOBS and may be deployed in other contexts in future. We note that the terminology relating to an "operationally distinct brand" would need to be considered in any future deployment as this is only likely to be appropriate where the rules relate to client-by-client protections, as opposed to bank-wide organisational requirements.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact Mark Kalderon by email at mark.kalderon@freshfields.com in the first instance.

Yours sincerely

Karen Anderson
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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