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The Rt. Hon. Andrew Griffith MP, 13 April 2023

Economic Secretary to the Treasury and City Minister,

Dear Minister

The City of London Law Society ("**CLLS**") represents approximately 15,000 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, multijurisdictional legal issues. This submission has been prepared by the Financial Law Committee of the City of London Law Society, whose members specialise in major financings, both those involving securities which are subject to regulatory oversight and those loan arrangements which fall outside those rules. The concern we have is that the proposed changes bring within the scope of the new Public Offer prohibition many transactions wholly unsuited to this regime.

Introduction

The CLLS Financial Law Committee welcome the opportunity to engage with His Majesty's Treasury ("**HMT**") and the FCA and provide feedback on the illustrative Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023 (the "**SI**").

We refer to recent comments on the SI provided by ICMA, ISDA and UK Finance. We acknowledge the desire to bring certain non-transferable debt securities ("**NTDS**"), such as minibonds, within the regulatory ambit. However, we strongly agree with ICMA, ISDA and UK Finance that, as currently drafted, the SI creates an unduly wide definition of "relevant securities" that would potentially capture and bring within the scope of the new Public Offer prohibition many financial products that we consider do not properly belong within this regime, such as loans and OTC derivatives. This would go well beyond the stated policy objectives as set out in HMT's Policy Statement of 9 December 2022 (the "**Policy Statement**"), within which we refer to HMT's intention to largely restate and replace terms already in use in the existing Prospectus Regulation.

These products are generally already subject to separate regulation, and bringing them within the public offer prohibition would, in our view, be inappropriate. It would risk introducing unnecessary complexity, cost and longer transaction timetables in critically important markets and, in many cases, be difficult to comply with in the context of a prohibition and exemptions designed for the issuance and/or admission to trading of securities.

We recognise that, in many cases, an exemption from the public offer prohibition may apply. However, this is not always straightforwardly the case and it is not possible to consider exhaustively all of the fact patterns that may arise or anticipate all possible unintended consequences. We do

not consider it appropriate that participants in markets which are neither within the ambit of the existing Prospectus Regulation nor within the intended additional scope contemplated by the Policy Statement should fall under an obligation to consider, on a transaction-by-transaction basis, whether an exemption is available.

Instead, we suggest that the drafting should aim to expand the scope of the public offer prohibition more narrowly to capture the non-transferable securities (such as minibonds) referred to in the Policy Statement.

Relevant Securities

As currently drafted, the definition of "relevant securities" at Regulation 4(1) covers:

(a) Transferable securities, other than excluded securities;

(b) Any of the investments specified in paragraph 2 other than transferable securities, excluded securities or anything excluded by paragraph 3, or

(c) Any of the investments specified in paragraph 4 other than transferable securities, excluded securities or anything excluded by paragraph 5.

Regulation 4(2)(b) goes on to include "*any other investment that consists of a right to receive payment of principal or interest on indebtedness incurred for borrowed money (whether or not there is an instrument creating or acknowledging indebtedness).*" This broad definition would capture financial contracts that are not securities (or quasi-securities) including loans. It may also capture certain derivatives and securities financing transactions, as well as some documents used in trade finance, such as bills of exchange.

There are also other provisions under Regulation 4 which could potentially capture loans (in addition to other agreements not currently considered to be "securities").

Exemptions

Under Regulation 8, activities relating to public offers of relevant securities and advertisements of such securities will be designated activities under section 71K FSMA. Under proposed section 71L FSMA, designated activities are either of a type which are subject to a prohibition (as in the case of an offer of relevant securities to the public in the United Kingdom) or a person carrying them on must comply with designated activity rules.

Regulation 5 provides a list of "excluded securities". However, as currently drafted, this list does not assist with excluding the range of financial contracts that are not securities, such as loans and derivatives, which would be brought within scope under Regulation 4.

Schedule 1, Part 1 provides exceptions from the prohibition on offers of relevant securities to the public. Some of these may be helpful in certain circumstances. For example, paragraph 3 excludes an offer of relevant securities to fewer than 150 persons, so should exclude lending transactions other than the largest syndicated deals (although the way in which a loan syndication may take place in stages over an extended period rather than by way of a single offer could make compliance with this exemption problematic). However, it will not always be possible to rely on an exemption, so we do not consider this sufficient to bring loans outside the scope of the legislation. Nor do we understand it to be a policy objective to distinguish between large, syndicated deals and small lender groups for regulatory purposes.

Peer to peer lending activity is unlikely to benefit from this exemption. Often peer lending platforms are open to a large number of potential investors, making the 150 persons exemption redundant for the majority of these types of lending transactions. We note that there is a de minimis threshold, below which offers to the public will be exempt, however it is unclear at this stage what that amount would be. We note that the Policy Statement refers specifically to a new regulated activity for public offer platforms such as securities-based crowdfunding, and offers which are not otherwise exempt will need to be made through a public offer platform under paragraph 7 of Schedule 1. It would seem an odd outcome if peer to peer lending and lending platforms were required to follow this route.

We also refer to ISDA's view that it is unclear whether this exemption would assist in bilaterally negotiated derivative transactions. We further reiterate that derivatives markets are already subject to separate regulatory oversight and we do not think it is appropriate for participants that are already regulated to be required to seek and confirm that they fall within an exemption from the public offer prohibition.

More generally, we note that the wording of the exemptions applies concepts and drafting (such as "denomination per unit" or "consideration [for the acquisition of securities]") deriving from the securities markets to which the Prospectus Regulation has historically applied and whose application to other, quite different, financial products such as loans and derivatives is much less clear.

It will not always be possible to conclude with certainty that an exemption would apply, particularly as, for example, loans, derivatives and secured lending transactions do not fall within the existing prospectus regime. For transactions that would not obviously benefit from an exemption, such as peer to peer lending, it will be challenging to work through the public offer analysis to find an exemption that may not easily fit or to comply with rules that may be applied to public offer platforms, which would inhibit the development of this market.

Proposed recommendation

We strongly recommend that rather than having a wide definition of "relevant securities" and a list of exceptions, the SI is reframed to define "relevant securities" in line with existing legislation, and then introduce additional categories that potentially could be added to over time. This approach would make it clear that products that are not intended to be within scope, such as loans and derivatives, are not captured and would avoid uncertainty and disruption that might otherwise occur.

We look forward to discussing the issues raised in this letter further with you and would be happy to address any questions or concerns you may have. Please contact me and/or Edward Fife of Slaughter and May, who has chaired our working group on this topic (edward.fife@slaughterandmay.com 020 7090 3662).

Yours sincerely

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Chair

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