CLIFFORD
CHANCE

Briefing note

International Regulatory Update

20 – 24 October 2014

IN THIS WEEK'S NEWS

- EU Commission proposes detailed rules on contributions to national resolution funds and Single Resolution Fund
- ECB consults on draft regulation on supervisory financial reporting
- ECB Decision on the separation of monetary policy and supervisory functions published in the Official Journal
- Delegated Regulation on professional indemnity insurance for mortgage credit intermediaries published in Official Journal
- EBA consults on guidelines on the security of internet payments and enhances cooperation with ECB through SecuRe Pay forum
- EBA publishes recommendation regarding breach of Deposit Guarantee Schemes Directive by Bulgarian National Bank
- LIBOR: ICE Benchmark Administration consults on changes in response to FSB report
- BoE publishes approach to resolution
- Russia, Crimea and Sevastopol (Sanctions) (Overseas Territories) Order 2014 published
- Financial Intelligence Unit publishes annual report for 2013
- SFC and CSRC sign MoU to strengthen enforcement cooperation under Shanghai-Hong Kong Stock Connect
- Hong Kong and South Africa sign double taxation agreement
- Inland Revenue Department announces gazettal of orders implementing double taxation agreements with Korea and Vietnam
- FSA responds to comments received on draft regulations on banks' exposures to single counterparties
- Federal agencies adopt joint rule to implement Dodd Frank Act credit risk retention requirements
- Recent Clifford Chance Briefings: Shareholder Rights Directive II; OTC derivatives regulations in Japan; and more. Follow this link to the briefings section.

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please click here.

To request a subscription to our Alerter: Finance Industry service, please email Online Services.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +1 212 878 3119

Marc Benzler +49 69 7199 3304

Steven Gatti +1 202 912 5095

Mark Shipman + 852 2826 8992

Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

EU Commission proposes detailed rules on contributions to national resolution funds and Single Resolution Fund

The EU Commission has adopted a delegated act on the calculation of banks' contributions to national resolution funds in all 28 EU Member States under the Bank Recovery and Resolution Directive (BRRD) from 1 January 2015 and a draft proposal for an EU Council implementing act on the calculation of contributions to the Single Resolution Fund (SRF) under the Single Resolution Mechanism Regulation (SRM Regulation) from 1 January 2016.

The BRRD sets up national resolution funds to which all banks have to contribute. The target level of these funds is of at least 1% of the amount of covered deposits of all the institutions authorised in its territory by 31 December 2024. In the Banking Union, the Single Resolution Fund will also have a target level of at least 1% of the amount of covered deposits of all the institutions authorised in the euro area.

The delegated act under the BRRD sets out the principle for how much individual credit institutions will pay each year to their respective resolution funds, which will be based on the bank's size and risk profile. Contributions will consist of:

- a fixed element to be based on the institution's liabilities, excluding own funds and guaranteed deposits, to ensure that the largest banks make the largest contributions and defining small banks as those with less than EUR 1 billion in assets and deposits of less than EUR 300 million; and
- an adjustment to this basic contribution based on the risk posed by the institution.

In addition to these rules the draft delegated Regulation also sets out the registration, accounting, reporting and other obligations on institutions to ensure payment of annual contributions.

The Commission's proposal for a Council implementing act specifies the methodology for calculating annual contributions to the Single Resolution Board, which will administer the Single Resolution Fund to be built up gradually by Member States participating in the Banking Union. The Commission proposes to use the same risk indicators as in the delegated act under the BRRD.

The delegated Regulation is subject to a right of objection by the EU Council and EU Parliament within three months, which is then extendable for another three months. The Commission will formally adopt the proposal for a Council implementing act after 1 November 2014, and the Council will then have until the end of the year to adopt the proposal.

ECB consults on draft regulation on supervisory financial reporting

The European Central Bank (ECB) has published a draft regulation on reporting of supervisory financial information for consultation. The regulation is intended to complete the requirements for supervisory reporting of financial information on banks within Member States participating in the Single Supervisory Mechanism (SSM).

The draft regulation sets out:

- reporting requirements for supervised entities to the ECB following the assumption of the ECB's supervisory role from 4 November 2014, including both significant supervised entities and their subsidiaries in non-participating Member States or third countries and information to be provided for less significant groups;
- rules for submission of information from national competent authorities (NCAs) to the ECB; and
- uniform supervisory financial reporting requirements to significant supervised groups, through completion of relevant templates.

Comments are due by 4 December 2014.

ECB Decision on the separation of monetary policy and supervisory functions published in the Official Journal

A Decision of the European Central Bank on the implementation of separation between the monetary policy and supervision functions of the ECB (ECB/2014/39) has been published in the Official Journal. Under the SSM, the ECB is required to ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. The Decision sets out the arrangements for the separation of the ECB's monetary and supervisory functions, in particular with respect to professional secrecy and the exchange of information between the two policy functions.

The decision entered into force on 18 October 2014.

Delegated Regulation on professional indemnity insurance for mortgage credit intermediaries published in Official Journal

A Commission Delegated Regulation (1125/2014) with regard to regulatory technical standards (RTS) on the minimum monetary amount of the professional indemnity insurance or comparable guarantee to be held by credit intermediaries has been published in the Official Journal.

The RTS were developed under the Mortgage Credit Directive (2014/17/EU) and the Delegated Regulation is based on the draft RTS submitted by the European Banking Authority (EBA) to the Commission following a consultation.

EBA consults on guidelines on the security of internet payments and enhances cooperation with ECB through SecuRe Pay forum

The European Banking Authority (EBA) has launched a consultation on draft guidelines on the security of internet payments as a first step in enhanced cooperation between the EBA and the ECB on retail payment security.

The draft guidelines are based on final recommendations published by the ECB on 31 January 2013 following work by the European Forum on the Security of Retail Payments (SecurRe Pay), a voluntary cooperative initiative between relevant authorities from the European Economic Area (EEA) that aims at facilitating knowledge and understanding of issues related to the security of electronic retail payment services. In summer 2014 the SecuRe Pay forum concluded that a more solid legal basis would help to ensure the consistent implementation of the recommendations across the EU and the EBA, a member of the SecuRe Pay forum, agreed to develop these guidelines.

The legal basis of the guidelines is the Payment Services Directive (PSD), although the EBA notes that negotiations for the revised Payment Services Directive (PSD2) currently indicate that the final PSD2 text may include stronger requirements for security standards than those included in these guidelines. Among other things, the EBA seeks views on the approach for implementing potentially stronger requirements under PSD2 through these guidelines. Comments on the consultation are due by 14 November 2014. The EBA intends that the final guidelines will enter into force on 1 August 2015.

The EBA and ECB have agreed to cooperate and coordinate through SecuRe Pay on the security of electronic retail payment services, systems and schemes. SecuRe Pay will work as a common basis for both Eurosystem standards for the oversight of payment systems and retail payment instruments, and the EBA's regulatory and supervisory requirements for payment services across the whole of the EU. To coincide with the agreement, the ECB has published an updated version of SecuRe Pay mandate on its website.

EBA publishes recommendation regarding breach of Deposit Guarantee Schemes Directive by Bulgarian National Bank

The EBA has adopted a formal recommendation addressed to the Bulgarian National Bank (BNB) and the Bulgarian Deposit Insurance Fund (BDIF) notifying that they are breaching the Deposit Guarantee Schemes Directive (DGSD – Directive 94/19/EC). The EBA has taken this action under the enforcement mechanism for the European Supervisory Authorities, comprising the EBA, European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), under Art. 17 of Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority).

In June 2014 the BNB placed two Bulgarian banks, Corporate Commercial Bank AD (KTB) and Commercial Bank Victoria EAD (VCB), under conservatorship and suspended all payments. Depositors have had no access to their funds through these banks or a deposit guarantee scheme (DGS) since this time and the Recommendation issued by the EBA addresses this breach of the DGSD, under which depositors with deposits of up to EUR 100,000 should be compensated within a total 25 working days of deposits falling unavailable. In line with established EU case law, the recommendation states that a Member State authority cannot rely on national legislation as a reason for non-compliance with an EU obligation. The EBA expects that protected deposits should be made available under the DGSD by 21 October 2014 either through the removal of BNB actions that have limited access to deposits or through the triggering of immediate compensation by the BDIF. The EBA states that the BDIF should pay out due and verified claims if the BNB fails to take one of these necessary actions.

LIBOR: ICE Benchmark Administration consults on changes in response to FSB report

ICE Benchmark Administration (IBA), the administrator of the London Inter Bank Offered Rate (LIBOR), has published a position paper for consultation on proposed changes to LIBOR. The paper has been published in response to the Financial Stability Board's (FSB's) July 2014 report on reforming major interest rate benchmarks, which focussed on LIBOR, EURIBOR and TIBOR.

Among other things, the IBA paper sets out proposed enhancements to LIBOR, including:

- broadening the scope of eligible transactions for submissions;
- introducing a more prescriptive calculation methodology using pre-defined parameters;
- specifying that transaction-based submissions be used where possible but setting out a waterfall methodology where not;
- enabling submitters to use transactions from all representative locations;
- allowing all wholesale and professional entities to be regarded as eligible counterparty types;
- developing systems of analysis to clarify the methodology for producing a matrix of eligible transaction sizes as well as minimum aggregated volume for each currency; and
- clarifying the extent to which qualitative methods play a role.

IBA has requested views on the proposed changes by 19 December 2014. IBA is also interested to receive information on the usage of LIBOR in relation to specific currencies and maturity periods.

BoE publishes approach to resolution

The Bank of England (BoE) has published its approach to resolution in its capacity as the UK resolution authority for banks, building societies and investment firms. The paper provides details of the BoE's toolkit for resolving failed institutions and how it would apply this to enable the orderly failure of firms and in order to maintain financial stability. The BoE's approach includes three key stages for resolution, which a firm would go through:

- stabilisation phase: the BoE would select the most appropriate method to stabilise the firm once it has entered resolution;
- restructuring phase: the firm will need to restructure to address the causes of its failure; and
- exit from resolution: the point at which the BoE will no longer have involvement with resolution when a firm no longer requires liquidity support.

The approach enhances the existing UK resolution regime under the Banking Act 2009 and complies with the Bank Recovery and Resolution Directive (BRRD), which will apply from 1 January 2015, and will bring the UK into line with the Financial Stability Board's (FSB's) international standard for the resolution of banks and investment firms.

The paper complements the Banking Act Code of Practice, which sets out the circumstances in which authorities will use resolution tools.

Russia, Crimea and Sevastopol (Sanctions) (Overseas Territories) Order 2014 published

The Russia, Crimea and Sevastopol (Sanctions) (Overseas Territories) Order 2014 (SI 2014/2710) has been published. The Order gives effect to EU prohibitions under EU Council Decision 2014/386/CFSP of 23 June 2014 (as amended by EU Council Decision 2014/507/CFSP of 30 July 2014) and EU Council Decision 2014/512/CFSP of 31 July 2014 (as amended by EU Council Decision 2014/659/CFSP of 8 September 2014) in the following specified UK Overseas Territories:

- Anguilla;
- British Antarctic Territory;
- British Indian Ocean Territory;
- the Cayman Islands;
- the Falkland Islands;
- Montserrat;
- Pitcairn, Henderson, the Ducie and Oeno Islands;
- St Helena, Ascension and Tristan da Cunha;
- South Georgia and the South Sandwich Islands;
- the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus;
- the Turks and Caicos Islands; and
- the Virgin Islands.

This Order entered into force on 16 October 2014.

Financial Intelligence Unit publishes annual report for 2013

The Financial Intelligence Unit (Cellule de Renseignement Financier, CRF) of the State Prosecutor's office to the Luxembourg District Court has published its annual report for 2013. The report sets out statistics on the CRF's activity during 2013 and the main trends and phenomena in the area of money laundering. The report emphasises that suspicious transaction reports linked to cybercrime, in particular hacking email accounts for the purposes of identity theft, have increased significantly in 2013. Furthermore, following the introduction into Luxembourg law in 2013 of the new primary offence of abuse of weakness (délit d'abus de faiblesse), the first suspicious transaction reports relating to this offence were submitted to the CRF in 2013.

SFC and CSRC sign MoU to strengthen enforcement cooperation under Shanghai-Hong Kong Stock Connect

The Securities and Futures Commission (SFC) and the China Securities Regulatory Commission (CSRC) have entered into a memorandum of understanding (MoU) on strengthening cross-boundary regulatory and enforcement cooperation under the proposed Shanghai-Hong Kong Stock Connect pilot programme. The Stock Connect is a pilot programme for establishing mutual stock market access between Hong Kong and Mainland China. Under the MoU, the SFC and the CSRC have agreed to:

- share information and data of risks and alerts about potential or suspected wrongdoing in either the Hong Kong or Shanghai stock markets under the Stock Connect;
- establish a commitment and a process for joint investigations;
- ensure complementary enforcement action can be taken where there is wrongdoing in both jurisdictions; and
- make sure enforcement actions in both jurisdictions operate to protect the investing public of both Mainland China and Hong Kong, including actions that may be necessary to provide financial redress or compensation to affected investors.

The SFC has indicated that the MoU will be activated upon the launch of the pilot programme subject to the finalisation of all necessary approvals, market readiness and relevant operational arrangements.

Hong Kong and South Africa sign double taxation agreement

Hong Kong and South Africa have signed an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The agreement, which sets out the allocation of taxing rights between the two jurisdictions, is intended to help investors better assess their potential tax liabilities from cross-border economic activities, strengthen economic and trade links, and provide added incentives for companies in South Africa to do business or invest in Hong Kong and vice versa.

The agreement is expected to come into force after the completion of ratification procedures by both sides.

Inland Revenue Department announces gazettal of orders implementing double taxation agreements with Korea and Vietnam

The Inland Revenue Department (IRD) has announced that two orders made by the Chief Executive in Council under the Inland Revenue Ordinance have been gazetted. The orders implement the comprehensive agreement for the avoidance of double taxation (CDTA) with Korea and the second protocol to the CDTA with Vietnam. The CDTA is intended to bring tax savings and a higher degree of certainty on taxation rights for investors from these jurisdictions when they engage in trade and investment activities with Hong Kong and vice versa. The CDTA and the second protocol will only take effect after both Hong Kong and the treaty partners have completed their ratification procedures.

FSA responds to comments received on draft regulations on banks' exposures to single counterparties

The Financial Services Agency (FSA) has published its views on public comments received in relation to drafts of the Amended Cabinet Order and Amended Administrative Ordinance of the Banking Act (the Amended Regulations). A bank is prohibited from granting credit to a 'single counterparty' if the amount exceeds a certain ratio of its equity capital as explained in the second bullet point below (the Large Exposure Regulations). The Amended Regulations further amend the existing regulations governing banks' exposures to a 'single counterparty' as follows:

- the Amended Regulations expand the scope of 'credit' to be regulated under the Large Exposure Regulations by adding, among other things, publicly offered bonds;
- the Amended Regulations lower the maximum amount of credit that a bank is allowed to grant to a 'single counterpary' (including its connected counterparties as discussed below) from 40% to 25% of its equity capital, in line with the current threshold for credit to a 'single counterparty' (excluding its connected counterparties); and
- the Amended Regulations also expand the scope of the definition of a 'single counterpary' under the Large Exposure Regulations – a 'single counterpary' shall include, among other parties, any entity which may materially influence a person to whom credit is granted (the borrower) and any counterparties connected to the borrower such as its subsidiaries, parent companies and sister companies.

The FSA plans to implement the Amended Regulations on 1 December 2014.

Federal agencies adopt joint rule to implement Dodd Frank Act credit risk retention requirements

The Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Department of the Treasury, the Federal Reserve System, the Federal Housing Finance Agency, the Securities and Exchange Commission and the Department of Housing and Urban Development have announced that they are adopting a joint final rule on credit risk retention.

The final rule implements the credit risk retention requirements of section 941 of the Dodd-Frank Act, which generally requires the securitizer of asset-backed securities to retain not less than 5% of the credit risk of the assets collateralizing the asset-backed securities. Section 15g also includes a number of exemptions from these requirements, including an exemption for asset-backed securities that are collateralized exclusively by qualifying residential mortgages.

The OCC has published the final rule on its website. The rule will become effective one year after the date of its publication in the Federal Register, which is expected shortly.

RECENT CLIFFORD CHANCE BRIEFINGS

Shareholder Rights Directive II – is it on your radar?

Earlier this year the Commission published a proposal to amend the 2007 Shareholder Rights Directive. Both the original Directive and its proposed replacement are first and foremost instruments of company law, with improved corporate governance as their underlying policy objective. However, the legislation has important implications – not all of them positive – for asset managers, custodians and other financial intermediaries holding dematerialized securities for themselves and their clients. Amidst the plethora of new financial regulation with which financial market participants are currently grappling, there is a danger that this Directive could slip under the radar.

This briefing provides an outline of the new legislation highlighting some key areas of concern.

http://www.cliffordchance.com/briefings/2014/10/shareholder_rightsdirectiveiiisitonyou.html

Recent developments in OTC derivatives regulations in Japan

The Financial Services Agency of Japan (FSA) has recently published a wide range of amendments and proposed amendments to OTC derivatives regulations as regards mandatory clearing, trade reporting and margin requirements, among other things.

This briefing provides a brief summary of these amendments and proposed amendments.

http://www.cliffordchance.com/briefings/2014/10/recent_developmentsinotcderivative.html

Chancery Court Dismisses Claims Over Buyout of Externally Managed Company

This briefing discusses the Delaware Chancery Court's recent ruling in re KKR Financial Holdings LLC Shareholder Litigation that the entire fairness standard of review does not apply to a merger between an externally-managed specialty finance company and an affiliate of the manager.

http://www.cliffordchance.com/briefings/2014/10/chancery_court_dismissesclaimsoverbuyouto.html