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Briefing note

International Regulatory Update

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Benchmarks Regulation: EU Council sets out negotiating position

The EU Council's Permanent Representatives Committee (COREPER) has agreed the EU Council's negotiating stance on the proposed regulation on indices used as benchmarks in financial instruments and financial contracts. It has asked the Latvian Presidency to start negotiations

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with the EU Parliament so as to enable adoption of the regulation at first reading.

The draft text agreed by COREPER has the following objectives:

- improving governance and controls over the benchmark process, in particular to ensure that administrators avoid conflicts of interest, or at least manage them adequately;
- improving the quality of input data and methodologies used by benchmark administrators;
- ensuring that contributors to benchmarks and the data they provide are subject to adequate controls, in particular to avoid conflicts of interest; and
- protecting consumers and investors through greater transparency, adequate rights of redress and an assessment of suitability where necessary.

The proposed regulation introduces a legally binding code of conduct for contributors of data requiring the use of robust methodologies and sufficient and reliable data. It calls for the use of actual transaction input data where possible, though other data may be used if the transaction data is insufficient. The proposal has a broad scope, although benchmarks deemed to be critical will be subject to stricter rules, including the power for the relevant competent authority to mandate contributions of input data. However, it will not apply to the provision of benchmarks by central banks and for public policy purposes.

Administrators of benchmarks will have to apply for authorisation and will be subject to supervision by the competent authority of the country in which they are located. If an administrator does not comply with the provisions of the regulation, the competent authority may withdraw or suspend its authorisation. Administrators will be required to have in place appropriate governance arrangements and controls to avoid conflicts of interest.

The European Securities and Markets Authority (ESMA) will coordinate the supervision of benchmark administrators by national competent authorities. For critical benchmarks, a college of national supervisors including ESMA will be set up and take key decisions.

EU Council approves AMLD 4 and Fund Transfers Regulation

The EU Council has approved the text of the fourth Anti-money Laundering Directive (AMLD 4) and the Regulation on information accompanying transfers of funds, which were agreed with the EU Parliament in December 2014 following trilogue negotiations.

The approved texts implement recommendations by the Financial Action Task Force and the new rules will include:

- a greater scope than the previous directive with a lower cash payment threshold, the inclusion of traders in goods and provisions to include providers of gambling services;
- tighter rules on customer due diligence, including a risk-based approach and requirements for gambling service providers on transactions of EUR 2000 or more except in strictly limited circumstances;
- establishing central registers of information on beneficial ownership of companies that will be accessible to competent authorities, financial intelligence units and obliged entities such as banks – Member States will have the option to establish public registers if they wish; and
- rules on sanctions that establish the maximum pecuniary fine of at least twice the amount of the benefit derived from a breach or at least EUR 1 million, with a higher minimum for breaches involving credit or financial institutions.

Final approval of the text will be voted on by the EU Parliament plenary session in either March or April 2015.

EBA reports on potential implications of regulatory measures for banks' business models

The European Banking Authority (EBA) has published a global overview of the potential implications of regulatory measures for banks' business models resulting from the collective implementation of the regulatory measures developed since the financial crisis. The report considers the possible implications of regulation and the likely first-round effects during the transitional period for implementation of:

- the Capital Requirements Regulation (CRR) and Directive (CRD 4);
- the Basel III leverage ratio (LR);
- the liquidity coverage ratio (LCR);
- the net stable funding ratio (NSFR);
- bank structural reforms;
- resolution regimes; and
- the EU Regulation on OTC derivatives, central counterparties and trade repositories (EMIR).

The report also includes a matrix providing an overview of the global trends that might affect banks' business models following the implementation of the new regulatory framework.

G20 announces priorities for 2015 and FSB unveils work programme for Turkish Presidency

The Financial Stability Board (FSB) has published a letter dated 4 February 2015 addressed to G20 finance ministers and central bank governors ahead of their meeting in Istanbul on 9-10 February. The letter sets out the FSB's work programme to advance its priorities for the next phase of regulatory reform during the Turkish Presidency of the G20 in 2015.

The FSB's priorities will be to:

- support efforts for the full, consistent and prompt implementation of agreed reforms through enhanced monitoring of the effects of implementation across jurisdictions and report back to the G20. In particular, the FSB will focus on further progress required for the implementation of agreed reforms to OTC derivative markets and cross-border consistency and effectiveness of rule-making;
- finalise the remaining post-crisis reforms on:
  - a capital framework for banks;
  - measures to help end 'too big to fail' and make progress towards addressing too big to fail in financial institutions other than banks including ongoing work on methodologies to identify non-bank, non-insurer global systemically important institutions; and
  - making derivatives markets safer through work with the Committee on Payments and Market Infrastructures (CPMI) and International Organization of Securities Commissions (IOSCO) to develop a coordinated work plan for authorities' oversight of central counterparties (CCPs) and their main clearing members; and
- address new risks to financial stability with a focus on market-based finance, through work to understand and respond to vulnerabilities in capital market and asset management activities, and misconduct.

Following the Istanbul meeting of G20 finance ministers and central bank governors, the G20 has published a communiqué outlining its priorities, especially on growth, and issues for further action. On regulatory reform, the communiqué highlights the G20's commitment to finalising the remaining core elements of the financial reform agenda:

- addressing too-big-to-fail through agreement on the international standard on total loss absorbing capacity (TLAC) for global systemically important banks;
- agreeing a methodology for identifying systemically important financial institutions other than banking and insurance institutions by the end of 2015;
- implementing the Key Attributes of Effective Resolution Planning Regimes;
- cross-border cooperation in the areas of resolution and OTC derivatives market reforms; and
- updating the shadow banking roadmap to further improve the oversight and regulation of shadow banking and address risks in market based financing.

German Ministry of Finance proposes draft law to transpose amended Transparency Directive

The German Ministry of Finance has proposed a draft law on the transposition of the amended Transparency Directive (Directive 2013/50/EU). Amongst other things, the draft law includes a clarification on the relevant point in time for the duty to make voting rights notifications, the abolition of the duty to publish quarterly reports and, beyond the Transparency Directive, a new licence requirement for central securities depositaries under Regulation 909/2014/EU. The draft contains further provisions implementing the Transparency Directive and aligning German law with some aspects which had not previously been implemented.

Comments on the draft law are due by 14 March 2015.

BaFin proposes draft circular on duties and obligations of depositaries under German Capital Investment Act

The German Federal Supervisory Authority (BaFin) has proposed a draft circular on the duties and obligations of depositaries under the German Capital Investment Act (KAGB). The circular covers certain aspects of Commission Delegated Regulation (EU) No 231/2013 supplementing the Alternative Investment Fund Managers Directive (AIFMD) and regulations under the KAGB covering depositaries for AIFs and UCITS. The circular makes reference to ESMA's consultation paper on guidelines on asset segregation (ESMA 2014/1326), which was published on 1 December 2014. For this reason, and in light of the implementation of UCITS V into German law, the circular will need to be updated at a later stage.

Comments on the draft circular are due by 27 March 2015.

FINMA consults on Anti-Money Laundering Ordinance

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on the draft revised version of the FINMA Anti-Money Laundering Ordinance (AMLO-FINMA).

The draft AMLO-FINMA reflects recent changes to the Anti-Money Laundering Act (AMLA) passed on 12 December 2014 as well as recommendations by the Financial Action Task Force.

The main amendments to the AMLO-FINMA include the following:

- the concept of 'controller' – this newly introduced concept is directed at all (directly supervised) financial intermediaries. It serves to consistently determine the natural persons behind operationally active legal entities and partnerships;
- special regulations for collective investment scheme (CIS) institutions – the new regulations are directed at fund management companies, CIS investment companies and CIS asset managers. CIS institutions must identify the subscriber of fund units and the beneficial owner. Simplified due diligence applies in certain circumstances;
- new payment methods – the revised AMLO-FINMA now governs the prerequisites under which relaxation of due diligence requirements is allowed for payment service providers offering cashless payment transactions; and
- reporting requirements – a new innovation under the revised AMLA is that despite reports to the Money Laundering Report Office (MROS), client instructions must be executed by financial intermediaries (assets are not frozen immediately). A new provision sets out that significant assets may only be withdrawn in a form which enables prosecuting authorities to follow the trail ('paper-trail').

The consultation closes on 7 April 2015.

Revised Code of Banking Practice published in Hong Kong

The Hong Kong Association of Banks (HKAB) and the DTC Association (DTCA) have jointly announced the launch of the revised Code of Banking Practice.

The Code has been revised after a comprehensive review undertaken by the Code of Banking Practice Committee, comprising representatives of the HKAB, the DTCA and the Hong Kong Monetary Authority (HKMA). The review sought to provide wider protection to customers, promote good banking practices and enhance the provisions of the Code to align them with international standards on financial consumer protection. Major enhancements to the Code, covering a wide range of banking products and services, include:

- extending the coverage of the Code to subsidiaries and affiliated companies controlled by authorised institutions;
- incorporating the 'G20 High-level Principles on Financial Consumer Protection' as general principles for authorised institutions to observe when providing products and services to their customers; and
- enhancing disclosure and transparency regarding terms and conditions, which includes the provision of new standardised 'key facts statements' by authorised institutions setting out the major terms and conditions of loan products to allow customers to easily access and compare details of such products, as well as explaining any revisions of terms and conditions of banking services.

The revised Code is effective from 6 February 2015. The HKMA expects authorised institutions to achieve full compliance with the new provisions as quickly as possible and within 6 months of the effective date. Another 6 months is allowed for compliance with those provisions that require system changes.

HKMA provides interim guidance on requirements in Banking (Liquidity) Rules

The Hong Kong Monetary Authority (HKMA) has issued a circular to provide the industry with interim guidance regarding the approach it will adopt in applying some of the key requirements set out in the Banking (Liquidity) Rules and related Code of Practice. The guidance takes into account issues identified, and common enquiries received, in the course of implementing the liquidity coverage ratio (LCR) and liquidity maintenance ratio (LMR) in Hong Kong. The key aspects covered in the interim guidance relate to:

- the designation of authorised institutions as category 1 institutions and the related process;
- supervisory monitoring of authorised institutions' compliance with the minimum LCR requirement during the phase-in period (i.e. from 2015 to 2018);
- notification of liquidity events to the HKMA and, where applicable, utilisation of high quality liquid assets (HQLA) in a period of financial stress;

- recognition of HQLA or liquefiable assets under the LCR (or LMR) (including the approach to applying or interpreting certain eligibility criteria);
- adoption of an 'alternative liquidity approach' in Hong Kong;
- treatment of retail deposits (including the issue of assessing the significance of early withdrawal penalties for term deposits); and
- treatment of operational deposits (including the approach to assessing whether the qualifying conditions are met).

The HKMA has indicated that the interim guidance will form the basis of its forthcoming revision of the existing module 'Liquidity Risk Management' (LM-1) under the Supervisory Policy Manual in the course of 2015, which may also include further guidance to take account of ongoing implementation experience. The revised LM-1 will be renamed as 'Regulatory Framework for Supervision of Liquidity Risk' to provide a comprehensive overview of the local regulatory liquidity framework (including guidance on the application of major requirements relating to the LCR and LMR).

Stamp duty waiver for transfer of shares or units of ETFs takes effect

The Inland Revenue Department has issued a circular to announce that the Stamp Duty (Amendment) Ordinance 2015 has been gazetted. The Amendment Ordinance amends the Stamp Duty Ordinance (SDO) to waive stamp duty payable on the transfers of shares or units of all exchange traded funds (ETFs). The ETF stamp duty waiver is effective from 13 February 2015.

Any contract notes and instruments of transfer (transaction documents) for transactions of shares or units of ETFs effected on or after 13 February 2015 are no longer required to be stamped or endorsed under the SDO. For transactions of shares or units of ETFs effected before 13 February 2015, the transaction documents are still required to be stamped or endorsed in accordance with the SDO and the relevant stamping procedures issued by the Stamp Office.

RBI issues circular providing clarifications regarding foreign investment in debt market in India by foreign portfolio investors

The Reserve Bank of India (RBI) has issued a circular to all authorised persons to clarify the requirements regarding foreign investment in India by foreign portfolio investors (FPIs). A separate circular issued on 3 February 2015 directed that all future investment by FPIs in the debt market in India must be made with a minimum residual maturity of three years.

The new circular is intended to clarify the applicability of the directions announced in the 3 February 2015 circular. In particular, the new circular provides the following clarifications:

- any fresh investments shall be permitted in any type of debt instrument in India with a minimum maturity of three years. FPIs will not be allowed to make any further investment in commercial papers;
- FPIs are not allowed to make any further investments in debt instruments having a minimum initial or residual maturity of three years with an optionality clause exercisable within three years; and
- FPIs are permitted to invest in amortised debt instruments provided the duration of the instrument is three years or above.

FSS adopts revised corporate disclosure form

The Korean Financial Supervisory Service (FSS) has adopted a revised corporate disclosure form in order to help investors make better decisions and help companies ease the burden of corporate disclosure. The FSS finalised the new disclosure form after collecting opinions from the Korea Listed Companies Association and relevant organisations since September 2014. The new form will apply to filings for 2014 and beyond.

The FSS intends to require full disclosure of compensation paid to high-ranking executive officers so that the link between pay and performance is transparent and clear. Companies are advised to provide more detailed information about their executive compensation policies and practices. In the 2013 annual report, 64.5% of all companies disclosed only the name of the governing rules by which executive compensation was determined.

Further, footnotes to the financial statements will be included in the annual report, immediately following the financial statements. This is intended to strengthen the responsibility of companies and prevent investors from mistaking them for part of an audit report. It is also expected to add to the convenience of search for the company's financial information. In the new disclosure form, information on financial status in the annual report will be put together. The period for which summarised financial statements are required will be reduced from five years to three years.

The revision will also streamline company disclosure requirements by raising the threshold for a subsidiary to be included in the controlling company's disclosure from KRW 50 billion to KRW 75 billion in total assets. In addition, the regulator will delete the clause 'a subsidiary deemed to have significant impact on the controlling company', easing the disclosure burden.

ASIC releases amended rules for OTC derivative trade reporting obligations

The Australian Securities and Investments Commission (ASIC) has amended the OTC derivative trade reporting rules, two months before the next phase of reporting entities are due to commence reporting on 13 April 2015.

According to ASIC, the amended rules make the reporting regime more user friendly and reflect feedback received from the industry since the reporting regime began.

The amended rules provide for:

- snapshot reporting as a permanent reporting option;
- a 'safe harbour' from liability for reporting entities using delegated reporting; and
- an expanded alternative reporting regime for foreign reporting entities, including a 'tagging' requirement to ensure information about reportable transactions is available to ASIC.

The amended rules also include a number of technical changes to the reporting requirements that address practical issues which have arisen since the reporting regime has been in place.

Notably, ASIC has announced that a proposed fourth reporting phase, capturing foreign subsidiaries of Australian banks and Australian financial services licence holders which do not fall within phases 1 to 3, will not be implemented at this stage.

SEC issues cybersecurity guidance

The US Securities and Exchange Commission (SEC) has announced the issuance of two publications concerning cybersecurity. The first publication, a Risk Alert from the SEC's Office of Compliance Inspections and Examinations (OCIE), contains observations based on examinations of more than 100 broker-dealers and investment advisers in an attempt to assess the current state of cybersecurity preparedness. The second publication is an Investor Bulletin issued by the SEC's Office of Investor Education and Advocacy (OIEA) that provides suggestions to help investors safeguard their online investment accounts.

SEC proposes new proxy statement disclosure requirements on employee, officer, and director hedging policies

The SEC has proposed amendments to its rules that would require 'principles' based disclosure of whether employees, officers or directors are permitted to purchase financial instruments or otherwise engage in transactions to hedge or offset any decrease in the market value of equity securities granted as compensation, or held directly or indirectly by the employee, officer or director.

The proposed amendments are designed to implement Section 955 of the Dodd-Frank Act, which required disclosure of the hedging policies that apply to all employees. That requirement goes beyond the existing hedging policy disclosure for Named Executive Officers required as part of the Compensation Disclosure and Analysis section of a proxy statement.

Under the proposed rule, a registrant would be required to disclose whether it permits any employees including officers or directors, to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) or otherwise engage in transactions that are designed to or have the effect of hedging or offsetting any decrease in the market value of equity securities granted as compensation, or held directly or indirectly by the employee, officer or director.

The proposed rule defines 'equity securities' as only those equity securities issued by the registrant, a parent, or any subsidiary of the registrant or parent that are registered under Section 12 of the Exchange Act.

The purpose of these new rules is to allow shareholders to know if employees and directors can structure their compensation so as to receive the benefits of long-term incentive programs even if the company does not perform. In the SEC's view, this can affect the alignment of shareholder interests with employees and directors.

A registrant that permits hedging transactions will need to disclose sufficient detail to explain the scope of the permitted transactions and which individuals may engage in such transactions.

The proposed disclosure would be required in a proxy statement or information statement relating to an election of directors; therefore, Emerging Growth Companies, Smaller Reporting Companies and Listed Closed-End Funds will be subject to the disclosure requirements as proposed, but not Foreign Private Issuers that are exempt from proxy

requirements. The proposed rule will undergo a public comment period and, if adopted, will not become effective in time for the 2015 proxy season.

RECENT CLIFFORD CHANCE BRIEFINGS

EMIR – clearing exemption for pension scheme contracts

Pension schemes are important counterparties for firms active in the EU OTC derivatives market and the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR) provides a temporary exemption from the clearing obligation for certain contracts entered into by pension scheme arrangements.

This briefing discusses the pension scheme exemption under EMIR and how it affects firms dealing with pension schemes.

http://www.cliffordchance.com/briefings/2015/02/emir_clearing_exemptionforpensionschem.html

Poland implements rules regulating the penalties for infringing EMIR

EMIR requires EU Member States, amongst other things, to implement into national law rules regulating the penalties for infringing EMIR. The Member States were to notify the European Commission of the introduction of these provisions by 17 February 2013. Poland will now be able to fulfil this obligation, following the entry into force on 30 January 2015 of the act amending the Act on Trading in Financial Instruments and the Act on Supervision of Capital Markets, pursuant to which rules regulating the issue of penalties for infringing provisions of EMIR were implemented into Polish law.

This briefing discusses these rules.

http://www.cliffordchance.com/briefings/2015/02/poland_implementsrulesregulatingthepenaltie.html

Would a Dutch scheme help V&D survive?

The well-known Dutch department store chain Vroom & Dreesmann (V&D) is struggling to survive. In January, V&D announced some drastic measures, including a four month postponement of lease payments and a renegotiation of lease agreements with the aim of substantially lowering future lease payments for all stores. A number of landlords have strongly opposed these measures, and one of them has now started summary proceedings requesting the Dutch court to order V&D to evacuate a number of its stores due to non-payment of lease obligations.

This briefing addresses the issue between V&D and its landlords in the context of the draft bill on continuity of companies II (Wet Continuïteit Ondernemingen II), also referred to as the 'Dutch Scheme'.

http://www.cliffordchance.com/briefings/2015/02/would_a_dutch_schemehelpvdsurvive.html

Dutch 20 per cent bonus cap effective from 7 February 2015

The Dutch Act on the Remuneration Policies Financial Undertakings (Wet beloningsbeleid financiële ondernemingen), which was originally envisaged to come into force on 1 January 2015, was adopted by the Dutch Senate on 27 January 2015 and came into effect on 7 February 2015. The Act is primarily known for the 20% bonus cap but also provides for other pay constraints. The Act's requirements and restrictions on remuneration will apply on top of those contained in the Capital Requirements Directive (CRD 3 and CRD 4) and the Alternative Investments Fund Managers Directive (AIFMD).

This briefing addresses the scope and most important elements of the Act.

http://www.cliffordchance.com/briefings/2015/02/dutch_20_bonus_capeffectiveper7february2015.html

SEC staff provides new guidance for accelerated debt tender offers

The staff of the SEC's Division of Corporation Finance has issued new guidance on the requirements and conditions for conducting accelerated tender offers for non-convertible debt regardless of its rating. In addition to expanding the availability of a shortened process to non-investment grade debt, the new guidance permits an accelerated timeline for certain debt-for-debt exchange offers, but imposes new requirements and conditions on offerors seeking to make an accelerated tender offer. The SEC staff began this process back in April 2014, when they created a working group that included issuers, bankers and large institutional fixed-income investors to help update staff guidance on the conduct of accelerated debt tender offers that had been largely unchanged since the mid 1980s. The guidance comes in the form of a no-action letter in response to the official request of certain representatives of the working group.

This briefing discusses the accelerated debt tender offers guidance.

http://www.cliffordchance.com/briefings/2015/02/sec_staff_providesnewguidanceforaccelerate.html

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