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Briefing note

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- Recent Clifford Chance Briefings: Inside Information; UK Budget 2015; and more. Follow this link to the briefings section.

ESMA consults on application of disclosure requirements to private and bilateral transactions for structured finance instruments

The European Securities and Markets Authority (ESMA) has issued a call for evidence to collect information about the approach to disclosure for structured finance instruments (SFIs) originated and/or traded on a private and/or bilateral basis. The responses will serve as an input for the 'phase-in approach' on the extension of the disclosure requirements of the Credit Rating Agencies Regulation (CRA 3) RTS for private and bilateral transactions in SFIs.

The call for evidence has two objectives:

- to seek the views of market participants and gather information that may help ESMA to define private and bilateral transactions in SFIs and to establish whether the two categories should be kept separate; and
- to gather evidence to assess whether the disclosure requirements could be used in their entirety for private and bilateral SFI transactions or whether they should be adapted.

The evidence collected by ESMA will be analysed as part of the revision of the existing CRA 3 RTS.

Comments are due by 20 May 2015.

ESMA publishes peer review on implementation of automated trading guidelines

ESMA has published the results of a peer review of 30 national competent authorities (NCAs) on the implementation of its guidelines on systems and controls in an automated trading environment for trading platforms (ESMA 2012/122).

The review, launched in 2013, has identified that all 30 NCAs have incorporated the guidelines into their legal frameworks and all but three NCAs have also incorporated the guidelines into their supervisory frameworks. The report highlights that the main provisions of the guidelines will be implemented through MiFID 2/MiFIR at Directorate level from 2017 and NCAs should consider incorporating the guidelines into supervisory frameworks accordingly.

Good practices discussed in the peer review relate to governance, IT, fair and orderly trading and the prevention of market abuse, but the report also identifies challenges for NCAs, including:

- cross-border cooperation between NCAs;
- market complexity requiring NCAs to further increase their IT expertise;
- engaging with trading platforms and sufficiently challenging them, for which ESMA suggests probing on-site inspections or other direct supervisory tools;
- ensuring sufficient resources to effectively carry out supervision;
- testing trading algorithms against stressed trading scenarios; and
- protection for trading platforms against cyber attacks.

EBA publishes guidelines for establishing standardised terminology for payment account fees

The European Banking Authority (EBA) has published its final guidelines on standardisation of terminology for payment accounts in the EU under the Payment Accounts Directive (PAD – Directive 2014/92/EU). The PAD is intended to establish standardised terminology fees at Member State level and EU-level, when services are identified as common to at least a majority of Member States. The EBA is tasked with developing the standardised terminology and accompanying information documents for consumers, which are expected to be published by 2016.

In order to carry out this work, the EBA requires NCAs to submit lists of between 10 and 20 of the most representative services linked to payment accounts that are most commonly used by consumers or generate the highest cost for consumers, both overall and per unit, and offered by at least one payment service provider (PSP) in their jurisdiction. The guidelines are intended to ensure the consistent application of the criteria that NCAs rank services against in order to compile the lists. The guidelines also set out factors that NCAs should take into consideration, how the lists should be reported to the EBA and what supportive data should be obtained.

Once NCAs submit lists, the EBA will begin work to develop standardised terminology at EU-level.

EBA issues final draft implementing technical standards on supervisory reporting

The EBA has published its final draft implementing technical standards (ITS) amending the Commission's Implementing Regulation (EU) No 680/2014 on supervisory reporting under the Capital Requirements Regulation (CRR). The final draft ITS include minor changes to templates and instructions which the EBA deemed necessary to publish in order to reflect some of the answers published in its Single Rulebook Q&A, as well as to correct legal references and other clerical errors.

The EBA has also published a:

- version of the annexes of this final ITS in track-changes; and
- framework release 03/2015 which includes validation rules, data point model (DPM) and XBRL taxonomies reflecting the amended templates.

The amendments are expected to be applicable for reporting as of June 2015.

EBA consults on criteria to limit exposure to shadow banking entities

The EBA has launched a consultation on draft guidelines proposing criteria to set limits on EU institutions' exposures to shadow banking entities.

The guidelines set out a qualitative approach for institutions to develop their internal policies for monitoring and setting appropriate limits, and are also intended to help inform the EU Commission's work in relation to its report on the appropriateness and impact of imposing limits on exposures to shadow banking entities under Article 395(2) of the CRR.

In the absence of a definition in EU banking legislation of the terms 'shadow banking entities', 'banking activities' and 'regulated framework', the EBA has developed a definition for the purposes of the guidelines. The proposed definition seeks to capture entities that are not subject to appropriate prudential supervision and is in line with the previous EBA opinion and report on the perimeter of credit institutions.

Comments are due by 19 June 2015.

Basel Committee and IOSCO issue revisions to implementation schedule of margin requirements for non-centrally cleared derivatives

The Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO) have released revisions to the framework for margin requirements for non-centrally cleared derivatives.

The framework was originally published in September 2013, following two public consultations. Recognising the complexity of implementing the framework, the Basel Committee and IOSCO have agreed to:

- delay the implementation of requirements to exchange both initial margin and variation margin by nine months; and
- adopt a phase-in arrangement for the requirement to exchange variation margin.

Relative to the 2013 framework, the revisions delay the beginning of the phase-in period for collecting and posting initial margin on non-centrally cleared trades from 1 December 2015 to 1 September 2016. The full phase-in schedule has been adjusted to reflect this nine-month delay. The revisions also institute a six-month phase-in of the requirement to exchange variation margin, beginning 1 September 2016.

Capital Markets Union: House of Lords EU Select Committee welcomes Commission proposals

The House of Lords European Union Select Committee has published a report entitled 'Capital Markets Union: a welcome start'. The report supports the proposals set out in the EU Commission's February 2015 Green Paper on building a Capital Markets Union, but the Committee warns that the initiative must be rolled out carefully and that it is unlikely to benefit all SMEs. The report also states that the EU should learn from the US example of the effective use of capital markets as a source of finance.

The findings of the report include that:

- a Capital Markets Union could be a major engine for stimulating growth in Europe, by diversifying businesses' access to finance – at the same time, cross-border capital for infrastructure and long term investment needs to be unlocked;
- the Commission must strike the right balance between ensuring SMEs access a wider variety of finance and protecting consumers and investors;
- the Commission must take account of the specific characteristics of each element of the EU's capital market, as well as the diverse needs and priorities of different Member States;
- the Commission's proposals must be road-tested through intensive impact assessments; and

- the UK should use its expertise and share best practice with other Member States.

Senior Managers Regime: PRA and FCA consult on extending regime to UK branches of overseas banks

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have launched a joint consultation (PRA 9/15 and FCA 15/10) on extending the Senior Managers Regime (SMR), Certification Regime and Conduct Rules to UK branches of overseas banks and PRA-designated investment firms. In line with EU law, the PRA's proposals are restricted to incoming non-EEA branches whereas elements of the FCA's proposals relate to EEA branches over which the FCA holds certain direct supervisory powers in relation to conduct of business. The consultation paper focuses primarily on proposals that have been tailored to incoming branches, while other features set out previously in consultations on UK relevant firms and non-executive directorships are summarised but not covered in detail in the paper.

The consultation paper includes proposals relating to the approval of:

- a Head of Overseas Branch;
- Chief Financial Officer (CFO), Chief Risk Officer (CRO) or Head of Internal Audit; and
- Group Entity Senior Manager for individuals based in another group entity that takes direct decisions relating to the management or conduct of a branch of a non-EEA bank's UK regulated-activities.

The scope of the PRA's proposals for a certification regime for incoming non-EEA branches and PRA Conduct Rules are proposed to be the same as for UK firms.

The consultation relates to forthcoming secondary legislation to extend the definition of a Relevant Authorised Person under s.71A of the Financial Services and Markets Act 2000 (FSMA) as amended by the Financial Services (Banking Reform) Act 2013. The Order is expected to extend the regime to include incoming branches of non-UK banks and PRA-designated investment firms that have permission to accept deposits in the UK.

Comments on the consultation are due by 25 May 2015.

Transparency Directive: FCA and HM Treasury consult on proposed amendments to FSMA and Disclosure and Transparency Rules

The FCA and HM Treasury have published a joint consultation paper (CP15/11) setting out the proposed amendments to the Financial Services and Markets Act 2000 (FSMA) and details of the FCA's proposed amendments to the Disclosure Rules and Transparency Rules (DTR), including the text of the proposed rule changes, that are required as a result of the Transparency Directive Amending Directive (2013/50/EU) (TDAD) modifications.

The consultation paper also:

- identifies other modifications made by the TDAD to the Transparency Directive provisions that may impact the current regime but either do not require new or amended DTRs to implement, or do not yet require DTRs; and
- proposes other miscellaneous changes to the DTRs that the FCA has identified as necessary to improve the current UK regime.

Comments are due by 20 May 2015.

Benchmarks: BoE launches Working Group on Sterling Risk-Free Reference Rates and data collection exercise on sterling overnight deposit transactions

The Executive Director for Markets at the Bank of England (BoE), Chris Salmon, has delivered a speech at the first meeting of the Working Group on Sterling Risk-Free Reference Rates, a private-sector group comprised of senior experts from major sterling swap dealers invited to participate by the BoE. The BoE has tasked the Working Group with identifying a suitable near risk-free reference rate (RFR) for sterling markets and formulating a transition plan in order that a significant number of derivatives contracts may reference the new RFR rather than LIBOR. The Working Group is expected to consult central counterparties (CCPs), exchanges, benchmark administrators and end users, including institutional investors and corporate treasurers, when carrying out its work.

Alongside preparatory work to identify the new RFR, the group has also been asked to consider how contracts referencing the new RFR can be made robust to changes in market structure.

Mr. Salmon also announced a new BoE initiative to collect daily data on banks' and building societies' sterling overnight deposit transactions to support robust overnight benchmark interest rates in sterling markets. The aim of this exercise is to monitor conditions in money markets to enhance the BoE's analysis of both monetary policy and financial stability. As such, 30 institutions have been asked

to participate in this exercise. Moreover, the BoE and FCA have entered discussions with the Wholesale Market Brokers Association, which administers the Sterling Overnight Index Average (SONIA), and the data collected by the BoE is intended to assist in further developing the SONIA benchmark.

SRM: German Ministry of Finance proposes draft law on implementation

The German Federal Government has proposed a draft law on the implementation of the Single Resolution Mechanism (SRM) and corresponding amendments to existing laws, including the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz), the German Restructuring Fund Law (Restrukturierungsfondsgesetz), the German Banking Act (Kreditwesengesetz) and the German Law on Covered Bonds (Pfandbriefgesetz). The draft law also includes proposed amendments to the financing of the German Federal Agency for Financial Market Stabilisation (FMSA). In addition, the draft law specifies the existing auditing requirements for derivatives pursuant to the European Market Infrastructure Regulation (EMIR) by amending the Audit Report Regulation (Prüfberichtsverordnung).

The consultation period ends on 27 March 2015.

Polish Ministry of Finance prepares draft Act on bank guarantee fund, deposit guarantee scheme and compulsory recovery

The Polish Ministry of Finance has prepared a draft Act on the Bank Guarantee Fund, the Deposit Guarantee Scheme and Compulsory Recovery. The draft Act implements the Bank Recovery and Resolution Directive (2014/59/EU) and the revised Deposit Guarantee Schemes Directive (2014/49/EU) into Polish law.

The draft has been sent for consultation with the general public and interministry approvals.

Capital Markets Union: Dutch government responds to EU Commission Green Paper

In a letter to the Dutch Parliament, the government has welcomed the proposals for a Capital Markets Union presented in the EU Commission's Green Paper and the corresponding consultation documents on securitisation and the Prospectus Directive.

The Dutch government believes that the focus in building a CMU should be on:

- increasing the availability of capital;
- improving access to financing; and
- a stable and shock resistant financial and economic system.

According to the Dutch government, the priorities for these points of focus should be to ensure that retail investors have better access to capital markets and that investment barriers for institutional investors are removed (e.g. by enabling more effective investment vehicles). Access to financing for enterprises should be improved by, amongst other things, promoting the cross-border movement of capital and encouraging alternative forms of investment such as credit unions and crowd funding. Additionally, the government has emphasised that the stability of the financial infrastructure should be strengthened by focusing on a framework for recovery and resolution for central counterparties involved in the clearing of derivatives due to their status as very system relevant parties.

The government believes that promoting the use of high quality securitisations should help achieve the above objectives as well as facilitating financing through capital markets for small and medium sized enterprises by reviewing the current prospectus requirements. It also notes that standardisation of information, for example required for the access of small and medium sized enterprises to the capital markets or for investments in infrastructure, could make a positive contribution to such facilitation.

MOFCOM and NDRC jointly release amended Foreign Investment Catalogue (2015 version)

The National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) have jointly issued the amended Industry Catalogue for the Guidance of Foreign Investments (2015 Guidance), which will take effect as of 10 April 2015 and replace the previous 2011 version. The 2015 Guidance reflects the PRC government's determination to further open up China's economy to foreign investments and to reform its regulation methodology to attract more foreign investments in certain key industries.

Amongst other things, the 2015 Guidance is intended to:

- reform foreign investment administrative measures from entry control to operational supervision and management – the 2015 Guidance substantially reduces the number of restricted industries from 79 to 38 and there will be no limitation on foreign shareholding percentage in industries falling into the 'permitted' category;

- further open up foreign investments in a variety of industries including manufacturing, medical and pharmaceutical, automobile, financial, telecommunication and internet, infrastructure and real estate, mining, wholesale, retail and logistics – unlike other value-added telecom companies, foreign investments in e-commerce companies are no longer capped at 50% (i.e., 100% foreign ownership is permitted); and
- direct foreign investments toward selected industries such as modern agriculture, high and new technology, advanced manufacturing, energy saving and environmental protection, new energy and modern service industry.

Shanghai International Energy Exchange consults on draft trading rules and other supplementary rules

Following the publication of the 'Interim Administrative Measures on the Trading of Designated Domestic Futures Products by Foreign Traders and Brokerage Firms (Consultation Draft)' by the China Securities Regulatory Commission (CSRC) on 31 December 2014, the Shanghai International Energy Exchange (INE) has published draft trading rules and other implementing rules for public consultation. The first designated futures product, crude oil futures, are expected to commence trading soon.

The INE Rules include INE general trading rules, INE membership rules, INE special overseas participants management rules and INE information management rules.

Under the INE Rules:

- products listed on the INE include futures contracts, options contracts and other derivatives approved by the CSRC, which will be denominated in RMB or other currencies as prescribed by the INE; and
- subject to approval/license by the INE, qualified overseas investors and brokers are allowed to directly engage in futures trading on the INE.

The public consultation period will end on 18 April 2015.

FSC publishes business guideline for financial market infrastructures

The Korean Financial Services Commission (FSC) has published a business guideline for financial market infrastructures (FMIs), which is intended to adopt the G20 Principles for Financial Market Infrastructures (PFMIs) as the guiding principles for the supervision of domestic financial market infrastructures.

The guideline provides specific standards that FMIs should comply with in conducting business pursuant to the Financial Investment Business and Capital Markets Act and its subordinate regulations. In particular, the guideline reorganises 24 key principles of the G20 PFMIS into 14 principles (common standards for FMIs) in accordance with Korean domestic circumstances and provides detailed standards to implement. The guideline provides additional requirements for clearing and depository businesses in addition to common standards for FMIs.

The guideline applies to the Korea Exchange (KRX), the Korea Securities Depository and financial investment instrument clearing companies. An FMI will be required to reflect the guideline in prescribing its internal rules that require approval by the FSC. Of the PFMIs, provisions of a mandatory nature are being implemented in relevant domestic regulations or will be reflected through regulatory revisions.

The FSC has indicated that the guideline is effective immediately, and whether FMIs observe the standards will be monitored. The FSC has advised FMIs to self-evaluate on a regular basis whether their internal rules and business operations are in compliance with international standards and disclose the results of that self-evaluation. The Financial Supervisory Service (FSS) will adopt the guideline as supervisory principles in its supervision and inspection of FMIs. The guideline will serve as the guiding principles for new FMI entrants to devise internal rules.

MAS and CAD to jointly investigate market misconduct offences

The Monetary Authority of Singapore (MAS) and the Commercial Affairs Department (CAD) of the Singapore Police Force have announced that they will jointly investigate market misconduct offences such as insider trading and market manipulation under Part XII of the Securities and Futures Act (SFA) with effect from 17 March 2015. The arrangement is intended to enhance the enforcement process as both agencies will collaborate from the outset, bringing about greater efficiency.

The MAS and the CAD have been investigating market misconduct offences independently, based on an initial assessment of whether the offence is likely to be a civil penalty or criminal prosecution case. The MAS and the CAD will now jointly investigate all potential market misconduct offences from the outset. The decision on whether a case is subject to civil penalty action or criminal

prosecution will be made when investigations are concluded.

Under the new arrangement, the MAS and the CAD will consolidate their investigative resources and expertise, and the new arrangement also seeks to allow for greater coordination when formulating enforcement policies in the area of market misconduct.

In addition, the arrangement is intended to improve the overall effectiveness of market misconduct investigations. The MAS officers taking part in the joint investigations are gazetted as Commercial Affairs Officers, giving them the same criminal powers of investigation as CAD officers. Such powers include the ability to search premises and seize items, and to order financial institutions to monitor customer accounts.

OIC allows insurance companies to make investments in Real Estate Investment Trusts and Infrastructure Funds

The Thai Office of the Insurance Commission (OIC) has issued amendments to its existing notifications on investments by insurance companies in other businesses. The amended notifications allow insurance companies (both life and non-life) to:

- invest in debt instruments issued by Real Estate Investment Trusts (REITs) or Infrastructure Funds (IFs);
- grant loans to REITs and IFs; or
- issue performance bonds or grant loans to any persons having debt instruments issued by such REITs mortgaged or pledged as security, provided that such REITs and IFs are listed on the Stock Exchange of Thailand and have a value of not less than THB 1.5 billion.

These amendments are made in accordance with the new SEC rules on the issuance of bonds by REITs. However, an insurance company cannot invest in debt instruments issued by any particular REIT or IF, or grant loans to any particular REIT or IF, in an amount exceeding 10% of the total investment assets of the insurance company. An insurance company must also comply with other conditions, for example, the debt instruments must be rated as investment grade, the overall investment limit in the debt instruments must not be more than 60% of the total investment assets of the insurance company, and/or an insurance company cannot grant a loan to any particular REIT or IF in an amount exceeding 70% of the estimated value of the mortgaged or pledged property securing such loan.

In addition, the person responsible for the investment department of the insurance company must not possess any of the prohibited characteristics similar to those imposed on directors of insurance companies, including among others, being bankrupt or sentenced to a term of imprisonment by a final court judgment for an offence relating to property.

ASIC clarifies documentation requirements for foreign financial service providers applying for exemptions

The Australian Securities and Investments Commission (ASIC) has clarified the documentation that foreign financial services providers should provide when applying to ASIC for class order exemptions to conduct business in Australia.

As outlined in ASIC's Regulatory Guide 176 Foreign financial services providers (RG 176) and Information Sheet 157 (INFO 157), foreign financial advisers must provide the following documents when applying for an exemption:

- an original dated letter of intention to provide financial services in Australia;
- a certified copy or original providing adequate evidence of registration, authorisation or permission from the overseas regulator;
- a notice of reliance;
- an original signed deed of reliance; and
- an original dated and signed letter addressed to ASIC consenting to mutual disclosure between ASIC and the overseas regulator.

Foreign financial services providers who have not registered with ASIC as a foreign company should also provide a certified copy or original evidence of their local agent appointment and its contact details and a certified copy or original providing evidence of registration as a body corporate or formation as a partnership in their country of formation.

Brokers or dealers registered with the US Securities and Exchange Commission and seeking to rely on Class Order [CO 03/1100] should also provide a certified copy or original evidence of membership with the Securities Investor Protection Corporation. Commodity pool operators or commodity trading advisers registered with the US Commodity Futures Trading Commission and seeking to rely on Class Order [CO 04/829] should also provide a written certification of adequacy of resources.

ASIC has indicated that a delay in the provision of these documents or an incomplete application that does not

contain all these documents can delay the granting of the exemption. Without the exemption, an Australian financial services licence or approval to be an authorised representative, foreign financial services providers are unable to conduct business in Australia.

Class orders that provide these exemptions will sunset in the coming years. ASIC will consider and consult on whether or not new class orders which extend this relief should be issued, and what might be the appropriate conditions for these new class orders.

RECENT CLIFFORD CHANCE BRIEFINGS

Inside information – what is 'precise' has just become more uncertain

The EU market abuse regime regulates the misuse of non-public price-sensitive information which is of a 'precise nature' (inside information). To be 'precise' information must (i) indicate that circumstances exist or that an event has occurred (or may reasonably be expected to come into existence or occur) and (ii) be specific enough to enable a conclusion to be drawn as to the 'possible effect' of those circumstances or that event on the price of the relevant investments.

In FCA v Hannam [2014] UKUT 0233, the UK Upper Tribunal held that for information to meet the second part of the precise test, one would need to be able to draw a conclusion as to the possible direction of any price movement.

The EU Court of Justice (CJEU) has now rejected that approach in its decision in the case of Lafonta v AMF (case C-628/13).

This briefing discusses the CJEU decision in Lafonta.

http://www.cliffordchance.com/briefings/2015/03/inside_informationwhatisprecisehasjus.html

UK Budget 2015

A Budget containing good news for savers, first-time home buyers and the oil industry. As with previous Budgets, there was little cheer for the banking sector with another increase in the bank levy combined with restrictions on deductions. With an election looming, the Budget was lighter than in recent years but there was still space for a number of new anti-avoidance measures. The introduction of the so-called 'Google tax' or, to give it its proper name, the Diverted Profits Tax, was confirmed. The month of January will never be the same again after the pledge to abolish the annual tax return comes into effect.

This briefing addresses the main business tax announcements.

http://www.cliffordchance.com/briefings/2015/03/uk_budget_2015.html

Liability Management in Russia

Over the last several years, Russian companies and banks have tapped the international capital markets for billions of US dollars through Eurobond issuances. With plenty of new money available in the market, liability management exercises were relatively rare. The current economic downturn, steep falls in oil prices and the exchange rate, alongside Russian borrowers' restricted international market access due to ongoing sanctions, have resulted in increased interest in liability management transactions for Russian companies.

This briefing addresses some of the legal, regulatory and taxation questions.

http://www.cliffordchance.com/briefings/2015/03/liability_managementinrussia.html

Collateral civil action lawsuits for corrupt wrongdoing – New to Australia

Internal investigations and disclosures arising from the discovery of bribery are very often followed by civil shareholder lawsuits claiming that the corrupt wrongdoing – or the failure to disclose it – are actionable offenses. This is not just a US problem; the first such class-action law suit has been filed in Australia. The high cost of collateral civil actions and the resulting reputational damage are two good reasons companies in Asia should consider carefully how to manage corrupt wrongdoing internally and externally.

This briefing discusses the first corruption-related class action in Australia and its implications.

http://www.cliffordchance.com/briefings/2015/03/collateral_civilactionlawsuitsforcorrup.html

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