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Briefing note

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- CBRC issues implementing measures on administrative licensing of foreign-funded banks
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EMIR: Joint Committee of ESAs consults on margin requirements

The Joint Committee of the European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA), has launched a second joint consultation on draft regulatory technical standards (RTS) on risk-mitigation techniques for non-centrally cleared over-the-counter (OTC) derivative contracts under the European Market Infrastructure Regulation (EMIR). The consultation follows a first consultation paper, published in April 2014, feedback from which identified certain operational issues associated with the implementation of the proposed framework. As such, the second consultation focuses on a narrow set of topics that the ESAs have not made decisions on based on feedback from the first consultation.

Among other things, the draft RTS in the second consultation set out:

- the regulatory amount of initial and variation margin to be posted and collected as well as the methodologies for calculations;
- criteria for eligible collateral and for ensuring that such collateral is sufficiently diversified and not subject to wrong-way risk;
- methods for determining appropriate collateral haircuts in order to reflect potential market and FX volatility; and
- operational procedures to be established by counterparties.

The draft RTS include a revised phase-in for initial margin requirements and new phase-in for variation margin following amendments to the Basel Committee on Banking Supervision (BCBS) and International Organization of Securities Commissions (IOSCO) standards published in March 2015.

Comments on the consultation are due by 10 July 2015.

Exposures to CCPs: Implementing Regulation extending transitional periods for own funds requirements published in Official Journal

A Commission Implementing Regulation to extend the transitional periods related to own funds requirements for exposures to central counterparties (CCPs) under the Capital Requirements Regulation (CRR) and EMIR has been published in the Official Journal. The CRR provides for a transition period before higher own funds requirements are applied to ensure a level playing field for all EU CCPs while the process of authorisation and recognition takes place. As the authorisation process for existing CCPs established in the Union is ongoing but was not completed by 15 June 2015, when the transitional period was set to expire, the Commission Implementing Regulation extends the transitional period for a further six months until 15 December 2015.

The Implementing Regulation entered into force on 12 June 2015.

EU Commission extends derivatives exemption from central clearing requirements for pension funds

The EU Commission has extended the exemption for pension funds from central clearing requirements for their OTC derivative transactions. The decision extends the existing exemption under EMIR for pension scheme arrangements (PSAs) until 16 August 2017. Under current arrangements, PSAs would have to source cash for central clearing. According to the Commission, CCPs need the additional time provided by the exemption to develop a solution that is appropriate for pension funds.

Banking Union: EBA publishes final technical advice on SRF contributions

The EBA has published final technical advice to the EU Commission on contributions to the Single Resolution Fund (SRF) under the Single Resolution Mechanism (SRM). The technical advice sets out criteria and principles for determining the uniform level of contributions by banks in participating Member States and, in particular, recommends:

- safeguards to ensure that the SRF's target level of 1% of the amount of covered deposits of all credit institutions authorised in all of the participating Member States is achieved by the end of the initial time period, which will be eight years from the date on which the provision becomes applicable;
- exceptionally taking into account pro-cyclical effects when determining the level of contributions; and
- criteria relating to contributions after a significant amount of the fund has been used to support
- resolution measures in order to replenish the SRF, which may require a significant increase of up to twice the amount of the contributions made in the previous years in order to build up the SRF as soon as possible.

The technical advice is intended to inform the Commission on drafting a delegated act on the initial period for the contributions to the SRF.

CRR: EBA publishes final draft RTS on assessment methodologies for Advanced Measurement Approaches to operational risk

The EBA has published final draft regulatory technical standards (RTS) on assessment methodologies for the use of Advanced Measurement Approaches (AMA) for own funds calculation and operational risk under the CRR. The final draft RTS set out the criteria to be taken into account by competent authorities when considering whether to grant institutions permission to use the AMA. Institutions may only be granted permission if they prove that all relevant qualitative and quantitative requirements set out in the RTS have been met and competent authorities will be expected to assess institutions on an ongoing basis after permission has been granted.

The final draft RTS establish a single document setting out the standards, which are intended to promote convergence between assessment methodologies of AMA frameworks, which set out:

- the key methodological components of the operational risk measurement system, in particular the classification, identification, collection and treatment of operational risk events; and
- the qualitative elements of an AMA framework with respect to the role and responsibilities of the operational risk management function and reporting system.

Once in force, the RTS will replace certain guidelines issued by the EBA's predecessor organisation the Committee of European Banking Supervisors (CEBS) addressed to AMA institutions and which are listed in the final draft RTS.

ESMA calls for evidence on best practice principles for proxy advisory industry

ESMA has issued a call for evidence on the impact and development of the Best Practice Principles for providers of shareholder voting research and analysis (BPP). The call for evidence is intended to help ESMA establish how stakeholders perceive the most recent proxy season since the BPP was published and the extent to which new trends or changes in proxy advisors' approaches have developed.

The call for evidence is addressed to all stakeholders in the proxy advisory industry and will focus on all firms providing research, advice or recommendations to investors on voting in relation to EU and EEA listed companies. ESMA has set out a three stage approach to the review of the BPP:

- stage 1 will assess the extent to which the BPP address the areas identified in ESMA's final report on the role of the proxy advisory industry in February 2013;
- stage 2 will consider the extent to which individual compliance statements published by signatory firms to the BPP correspond to ESMA's final report; and
- stage 3 will look at signatories' actual practice to determine the extent to which the conduct of the industry has changed following publication of the BPP.

Comments are due by 27 July 2015.

Basel Committee consults on supervision of interest rate risk in the banking book

The Basel Committee on Banking Supervision (BCBS) has launched a consultation on proposals to replace current BCBS guidance set out in the 2004 Principles for the management and supervision of interest rate risk (IRR Principles) with a strengthened framework on risk management, capital treatment and supervision of interest rate risk in the banking book (IRRBB). The new framework is intended to help ensure that banks have appropriate capital to cover potential losses from exposures to changes in interest rates and limit incentives for capital arbitrage between the trading book and banking book or between banking book portfolios that are subject to different accounting treatments.

The consultative document sets out two options for the regulatory treatment of IRRBB:

- a standardised Pillar 1 approach for calculating minimum capital requirements; or

- an enhanced Pillar 2 approach, with elements of Pillar 3 (market discipline), which would include qualitative disclosure of interest rate risk in the banking book based upon the proposed Pillar 1 approach.

The proposed IRRBB framework would be applied to large internationally active banks on a consolidated basis, consistent with the Basel II framework, and BCBS proposes that supervisors would have the discretion to apply the framework to other non-internationally active institutions.

Comments on the consultation are due by 11 September 2015.

IOSCO publishes final report on reducing reliance on credit rating agencies in asset management

The International Organisation of Securities Commissions (IOSCO) has published its final report on Good Practices on Reducing Reliance on Credit Rating Agencies (CRAs) in Asset Management. The Good Practices are addressed to national regulators, asset managers and investors, and the report suggests specific practices that asset managers could undertake to reduce any potential over-reliance on external credit ratings in the asset management industry.

In the report, IOSCO stresses the importance of asset managers having the appropriate expertise and processes in place to assess and manage the credit risk associated with their investment decisions. The report lists good practices that asset managers may consider when resorting to external ratings to avoid over-reliance.

Fair and Effective Markets Review publishes final report

The Fair and Effective Markets Review (FEMR) has published its final report on wholesale fixed income, currency and commodity (FICC) markets. The FEMR was launched by the Chancellor in June 2014 as a joint exercise between HM Treasury (HMT), the Bank of England (BoE) and Financial Conduct Authority (FCA) to assess whether changes made following a series of high-profile abuses within wholesale financial markets have gone far enough to reinforce confidence and identify areas for improvement.

The final report discusses analysis of the root causes of recent misconduct, evaluates the impact of the significant reforms already underway and sets out recommendations for further measures. The report contains 21 recommendations, including the regulation of seven additional benchmarks which has already been implemented and came into force on 1 April 2015. The recommendations are organised under six key principles, of which the first four relate to improving conduct in the near-term by:

- raising standards, professionalism and the accountability of individuals, including recommendations for common standards for trading practices, training and qualifications;
- improving the quality, clarity and market-wide understanding of FICC trading practices by establishing a new FICC Market Standards Board to monitor emerging risks, specific trading practices, adherence to standards and international convergence of standards;
- strengthening regulation of FICC markets in the UK, including proposals for a new statutory civil and criminal market abuse regime for spot FX and extensions to the Senior Managers and Certification Regimes to a wider range of regulated activities in FICC markets; and
- launching international action to raise standards in global FICC markets, including a single global FX code.

The fifth and sixth principles are intended to guide a more forward-looking approach to FICC markets:

- measures to promote fairer FICC market structures while also enhancing effectiveness; and
- forward-looking conduct risk identification and mitigation through early identification of emerging risks in market structures and behaviours.

The report highlights that certain recommendations may be implemented relatively quickly, while others will require further discussion including, for some recommendations, international negotiation or legislative change. The FEMR will provide a full implementation update on the proposals to the Chancellor and BoE Governor by June 2016.

An Open Forum will be held at the BoE in autumn 2015 and is expected to be an opportunity for stakeholders to discuss the report's recommendations.

FCA publishes final rules on restrictions for retail distribution of CoCos and regulatory capital instruments

The Financial Conduct Authority (FCA) has published a policy statement (PS15/14) including final rules on permanent restrictions on the retail distribution of contingent convertible securities (CoCos) and common equity tier 1 (CET1) share instruments issued by mutual societies. The FCA has decided to implement permanent rules due to concerns over the complexity for non-

sophisticated investors to value these instruments and unusual features that are unlikely to be appropriate for ordinary retail investors. Temporary rules took effect on 1 October 2014 and are due to expire on 1 October 2015.

The policy statement sets out responses to feedback received during a consultation on the proposals and the FCA's final approach. The FCA has decided that restrictions on retail distribution of CoCos currently in place represent a reasonable and proportionate regulatory response to the risks posed to consumers but that the permanent rules should only apply when firms sell, promote or approve promotions to retail clients but not when other intermediation activities give rise to transactions in CoCos. On mutual society core capital instruments, the FCA has decided to adopt its proposed approach but has changed the investment cap for ordinary retail investors to 10%.

The rules on mutual society shares will come into force on 1 July 2015 and the rules on CoCos from 1 October 2015.

CRD 4: PRA publishes policy and supervisory statements on supervising liquidity and funding risks

The Prudential Regulation Authority (PRA) has published a policy statement (PS11/15) and supervisory statement (SS24/15) setting out its approach to supervising liquidity and funding risks.

Feedback is also provided on responses to proposals in CP27/14 to accommodate the EU Commission's delegated act with regard to the liquidity coverage requirement (LCR) for credit institutions. The final rules reflect changes made in light of the feedback, including the following:

- the PRA will no longer stipulate a rule requiring firms to be able to comply with daily reporting against the whole range of COREP liquidity returns – instead the PRA will apply this requirement through a supervisory expectation and will only expect firms to be able to provide daily reporting for a sub-set of the returns;
- third country branches will not be required to provide whole-firm liquidity information through COREP returns – the PRA will determine the specific format of the required returns in due course; and
- the period that the FSA returns will run in parallel to the COREP LCR returns has been reduced. FSA054 will not be required past 1 October 2015, and FSA050 to FSA053 will not be required after 1 October 2015 or when their equivalent AMM return is received (whichever is later). The PRA will review the period that FSA0547 and FSA048 will be maintained, taking into account in particular progress in implementing the AMM return C 66.00.

The supervisory statement covers PRA expectations in relation to:

- the internal liquidity adequacy assessment process;
- the liquidity supervisory review and evaluation process;
- drawing down liquid asset buffers;
- collateral placed at the Bank of England; and
- daily reporting under stress.

The rules and supervisory statement come into force from 1 October 2015, except for Annex E to the PRA Handbook – Liquidity Standards Consequentials Instrument 2015, which deletes the requirement to submit certain liquidity returns. The rules in Annex E will come into force on a date specified by a subsequent PRA Board Instrument following adoption by the EU Commission of the EBA final draft implementing technical standards on additional liquidity monitoring metrics under Article 415(3)(b) of the CRR and subsequent PRA review.

CRR: BaFin publishes circular on implementation of EBA guidelines on materiality, proprietary and confidentiality and on disclosure frequency

The German Federal Financial Supervisory Authority (BaFin) has published Circular (05/2015 (BA)) on the implementation of the EBA guidelines (EBA/GL/2014/14) on materiality, proprietary and confidentiality and on disclosure frequency under Articles 432(1), 432(2) and 433 of the CRR. The guidelines are intended to provide a harmonised regulation of disclosure regimes under the CRR which are implemented by BaFin.

German law to implement revised Deposit Guarantee Schemes Directive published in Federal Gazette

The law to implement the revised Deposit Guarantee Schemes Directive (2014/49/EU) has been published in the German Federal Gazette. Under the law, all CRR-credit institutions are obliged to be a member of a deposit guarantee scheme (DGS). This obligation now also includes German saving institutions (Sparkassen) and cooperative banks (Genossenschaftsbanken) which used to be exempt from this obligation due to their membership of an institution guarantee scheme (Institutssicherung). In this respect, BaFin may now recognise the institution guarantee schemes as DGSs upon application.

The law will become effective on 3 July 2015.

Polish Council of Ministers sets out position on draft law amending Act on Capital Market Supervision as well as several other Acts

The Polish Council of Ministers has set out its position with respect to the PM's draft law amending the Act on Capital Market Supervision as well as several other Acts. Supervision over the capital market is effected by the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego), and over 90% of its cost is currently borne by the Stock Exchange and the National Depository of Securities. This system of financing is soon to be changed specifically by the Act amending the Act on Capital Market Supervision as well as several other Acts. In accordance with the draft law, the costs of supervision are to be borne by all the basic groups of entities conducting activity on the capital market, including the categories of supervised entities that have not been subject to direct charges (a substantial portion of the costs of supervision is to be borne by banks and insurance companies). The Council of Ministers has assessed these proposals positively. The draft law now awaits its second reading in the Polish Parliament (Sejm).

CRD 4: Polish Council of Ministers adopts bill on implementation

The Polish Council of Ministers has adopted a bill, presented by the Minister of Finance, amending the Act – Banking Law, the Act on Trading in Financial Instruments and some other Acts. The purpose of the bill is to partially implement the Capital Requirements Directive (CRD 4) in the Polish legal system. Moreover, the bill:

- aligns national legislation to the provisions of the CRR;
- introduces regulations which aim to replace the delegation to issue resolutions by the Financial Supervision Authority, stipulated in the Act – Banking Law, with authorisations for the minister responsible for financial institutions to issue ordinances aimed at eliminating doubts regarding the compliance of the existing model of the regulation of the banking sector with the Constitution; and
- introduces regulations which concern changes in the functioning of Bank Gospodarstwa Krajowego.

The bill is currently waiting to be referred to the Sejm.

Polish Council of Ministers adopts bill amending Act on Mortgage Bonds and Mortgage Banks

The Polish Council of Ministers has adopted a bill amending the Act on Mortgage Bonds and Mortgage Banks and some other acts. The purpose of the bill is to develop the market for mortgage bonds issued by mortgage banks, which are long-term securities characterised by a high level of safety and low investment risk.

The proposed amendments are intended to increase the level of security of creditors under mortgage bonds, thus lowering the costs of loans by way of cheaper financing of credit activity for banks and at the same time removing existing barriers related to the attractiveness of mortgage bonds for investors.

The bill is currently waiting to be referred to the Sejm.

Bill amending Act on Financial Market Supervision referred to Polish Parliament

A bill amending the Act on Financial Market Supervision, the Act – Banking Law and some other Acts has been referred to the Sejm and is awaiting its first reading. The objective of the bill is to, amongst other things:

- extend the powers of the Financial Supervision to carry out explanatory proceedings in relation to entities suspected of carrying out activity without a permit to all sectors of the financial market;
- strengthen the criminal sanctions for collecting funds of third parties without a permit in order to expose them to risk;
- introduce statutory requirements which, when met, will enable carrying out activity consisting in the provision of credit for consumers from the creditor's own funds;
- reduce the possibility of charging excessive fees, commissions and interest in credit and loan agreements; and
- establish the rules governing access to, transfer and exchange of information on consumer credit granted by banks and non-banking creditors.

MiFID2: Dutch Ministry of Finance consults on implementing bill

The Dutch Ministry of Finance has launched a consultation on a draft bill which, once enacted, would implement MiFID2 in the Netherlands. The following matters are covered in the draft bill:

- automated trading in financial instruments (including high frequency trading);
- the organised trading facility (OTF) used for trading of financial derivatives; and
- extended conduct of business rules for investment firms, e.g. the suitability test will be extended to shares,

bonds and money market instruments that contain an embedded derivative.

The draft bill also contains rules for investment firms from third countries (outside the EEA). Once enacted, the bill would have to be worked out in lower decrees and regulations.

The consultation ends on 6 July 2015.

CBRC issues implementing measures on administrative licensing of foreign-funded banks

The China Banking Regulatory Commission (CBRC) has issued the 'Implementing Measures on Administrative Licensing of Foreign-funded Banks', which lift a number of administrative licensing requirements regarding foreign-funded banks in China.

Among others, the following aspects of the Implementing Measures are worth noting:

- some licensing matters which are currently subject to the CBRC's jurisdiction are delegated to local banking regulatory authorities;
- the requirement of having established a representative office in China has been removed for (i) the controlling or sole shareholder of a wholly foreign-owned bank, (ii) the major or sole foreign shareholder of a Sino-foreign equity joint venture bank; and (iii) setting up a foreign bank's branch in China;
- a foreign-funded bank will no longer need to allocate an operation fund equivalent to no less than RMB 100 million to a branch proposed to be set up by it; and
- the qualification requirements for operating RMB business by a foreign-funded bank have been largely relaxed – for an initial application, the relevant bank only needs to have an operating history in China of more than 1 year (while a 3-year track record is currently required) and satisfy other prudential conditions as required by the CBRC.

The Implementing Measures became effective on 5 June 2015.

People's Bank of China issues rules to open domestic bond repo market

The People's Bank of China (PBOC) has issued the 'Circular on Engagement of Offshore RMB Clearing Banks and Offshore Participating Banks in Bond Repurchase Business in the Inter-bank Bond Market' in order to further open up the domestic bond market. The Circular is one of several efforts by China's policy makers to encourage greater global use of RMB.

Amongst other things, under the Circular:

- foreign banks allowed to engage in the bond repurchase business (Permissible Banks) must be approved by the PBOC to enter the inter-bank bond market and fall into one of the following categories:
  - offshore authorised RMB clearing banks incorporated in a foreign country/region which has established an RMB clearing arrangement with the PRC; and
  - offshore banks participating in cross-border RMB settlement in accordance with relevant PBOC regulations;
- Permissible Banks can carry out both the pledge type of repurchase transactions and the outright transfer type of repurchase transactions (bond repos) and move the proceeds abroad;
- the outstanding amount of financing via bond repos by a Permissible Bank must not exceed the amount of bonds it holds; and
- an inter-bank bond market settlement agency shall be appointed to handle the relevant trading and settlement matters.

HKMA issues circular on new reporting regime for OTC derivative transactions

The Hong Kong Monetary Authority (HKMA) has issued a circular to all licensed banks regarding the new reporting regime for over-the-counter (OTC) derivative transactions. The circular informs licensed banks that following the enactment of the Securities and Futures (Amendment) Ordinance 2014, which establishes the new regulatory framework, a set of Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules (Reporting Rules) have now been introduced into the Legislative Council for negative vetting. Once the negative vetting process has been completed, the HKMA will notify all authorised institutions of the effective date of the Reporting Rules.

The interim reporting requirements, introduced in 2013, will cease to apply upon the commencement of the Reporting Rules. Accordingly, the HKMA has advised licensed banks to comply with the Reporting Rules for reporting OTC derivative transactions from the effective date of their commencement. Supplementary guidance for licensed banks is annexed to the circular to ensure a smooth transition from the interim to the new reporting regime. In

particular, although a concession period and a grace period are provided for in the Reporting Rules, the HKMA considers that licensed banks should already have their reporting systems ready (given that they have been reporting transactions under the interim reporting requirements) and so should continue to report those transactions (new transactions or subsequent events relating to existing transactions) that would have been reported under the interim reporting requirements on a T+2 basis after the commencement of the Reporting Rules.

Securities and Futures (Amendment) Bill 2015 gazetted

The Financial Services and the Treasury Bureau (FSTB) has announced the gazettal of the Securities and Futures (Amendment) Bill 2015, intended to amend the Securities and Futures Ordinance (SFO) to enable the Securities and Futures Commission (SFC) to provide supervisory assistance to regulators outside Hong Kong.

The existing SFO makes no explicit provisions for the SFC to exercise its supervisory powers to obtain information for the purpose of assisting regulators outside Hong Kong in non-enforcement-related matters. The Bill amends the SFO to enable the SFC to provide a narrow form of supervisory assistance to regulators outside Hong Kong upon request. It also sets out additional safeguards applicable to the SFC's provision of the relevant supervisory co-operation to guard against requests for excessive information or unauthorised onward disclosure or use of information.

In addition, the Bill refines certain provisions in the SFO to reflect changes of circumstances since the SFO commenced in 2003 and provides more clarity in their administration.

The Bill will be introduced into the Legislative Council on 24 June 2015.

MAS issues responses to feedback received on proposed amendments to MAS Notice 648 on issuance of covered bonds by banks incorporated in Singapore and amended Notice 648

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received on its January 2015 consultation paper on proposed amendments to MAS Notice 648 to allow locally incorporated banks in Singapore to issue covered bonds. The proposed amendments to the Notice refine the regulatory framework governing covered bond issuance, granting further operational flexibility to banks seeking to issue covered bonds in Singapore.

Amongst other things, the MAS' key responses include the following:

- all banks are required to obtain legal confirmation that the cover pool assets are ring-fenced beyond their and their creditor's reach (even in an insolvency situation), regardless of the structure they adopt for the covered bond programme;
- the MAS will remove the requirement for minimum 80% loan-to-value (LTV) at the point of inclusion in the cover pool. Where a residential mortgage loan with an LTV in excess of 80% is included in the cover pool, only the portion of the loan amounting to an LTV of 80% may be used towards fulfilling the minimum over-collateralisation requirement of 103%. However, the entire loan amount will be used to compute compliance with the 4% encumbrance limit; and
- the MAS will retain the requirement that the aggregate value of assets in cover pools for all covered bonds issued by a bank shall not exceed 4% of the value of its total assets, at all times. To comply with the 4% limit, an issuing bank is to exclude all assets used to meet both the Singapore Dollar and all currency liquidity coverage ratio requirements at the bank solo level. All loans transferred to special purpose vehicles remain subject to the 4% encumbrance limit.

RECENT CLIFFORD CHANCE BRIEFINGS

Bank Indonesia issues further guidelines on the mandatory use of Rupiah in Indonesia

Bank Indonesia (BI) has issued Circular Letter No. 17/11/DKSP, dated 1 June 2015, on the Mandatory use of Rupiah within the Indonesian Territory. The Circular Letter has been issued as a further guideline to the implementation of BI Regulation No. 17/3/PBI/2015 (Regulation 17) issued in March 2015, which mandates the use of Rupiah in financial transactions in Indonesia.

The Circular Letter confirms the Indonesian government's firm intention to implement the mandatory use of Rupiah in transactions carried out in Indonesia from 1 July 2015. It is clear that Rupiah must be used in cash and non-cash transactions in Indonesia other than the specifically exempted transactions. However, it does provide the possibility for businesses facing difficulties in implementing the use of Rupiah to seek a special policy which allows them some time to adapt.

This briefing paper discusses the key provisions of the Circular Letter.

http://www.cliffordchance.com/briefings/2015/06/bank_indonesia_issuesfurtherguidelinesonth.html

Second Circuit Court of Appeals joins Seventh Circuit in holding that Post-Removal Amendment does not destroy CAFA jurisdiction

On 4 June 2015, the US Court of Appeals for the Second Circuit held that once a defendant removes a complaint to federal court under the Class Action Fairness Act (CAFA), the plaintiff's subsequent amendment of the complaint to remove the class-action allegations does not deprive the federal court of jurisdiction. In deciding In Touch Concepts, inc. d/b/a ZCOM v. Cellco Partnership d/b/a Verizon Wireless, the Second Circuit joined the Seventh Circuit in applying prior analogous Supreme Court holdings to the CAFA context.

This briefing paper discusses the judgment.

http://www.cliffordchance.com/briefings/2015/06/second_circuit_courtofappealsjoinssevent.html