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Briefing note

# International Regulatory Update

## 13 - 17 July 2015

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- Recent Clifford Chance briefings: Iran sanctions deal; and more. Follow this link to the briefings section.

**CRD 4: EU Commission consults on effect of capital requirements on bank lending**

The EU Commission has launched a consultation on what impact the Capital Requirements Regulation (CRR) and Directive (CRD 4) have had on bank lending. The CRD 4 package introduced revised capital requirements for banks, and the legislation requires the Commission to examine the effects of how these rules have worked in practice.

Specifically, the consultation seeks to address:

- to what extent the CRR and CRD 4 have affected the level of capital held by banks;
- whether the new requirements are proportionate to the risks they were intended to address;
- what impact the rules are having on lending to smaller businesses and to infrastructure projects; and
- if some of the rules could be simplified or differentiated by risk or size without compromising their objectives of financial soundness and stability.

The Commission intends to publish a feedback report based on the responses it receives to the consultation later in 2015, and its final report sometime in 2016.

Comments are due by 7 October 2015.

**CRR: EBA proposes corrections to adopted technical standards on non-delta risk options and identified staff**

The European Banking Authority (EBA) has issued a final report proposing amendments to the EU Commission to two regulatory technical standards (RTS) made under the CRR. The RTS address the treatment of non-delta risk options in the standardised market risk approach and the criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile.

The EBA has indicated that, during the legal adoption process of these two RTS, the Commission introduced changes which have inadvertently altered their meaning. The EBA proposes amendments to the text of these two RTS so that they reflect the intention of the text that was originally submitted to the Commission.

**EBA provides update on upcoming transparency exercise and 2016 EU-wide stress test**

The EBA has published a tentative sample of banks taking part in the 2015 transparency exercise, together with the draft templates illustrating the type of data that will be disclosed. In addition, the EBA has released the key features and a tentative calendar for the 2016 EU-wide stress test.

The 2016 EU-wide exercise is expected to be launched in the first quarter of 2016, with the release of the detailed scenario and methodology. The assessment and quality checks are expected to be concluded by the third quarter of 2016, when EU banks' individual results will be released.

**EBA publishes final guidelines on product oversight and governance for retail banking products**

The EBA has published its final product oversight and governance guidelines for retail banking products. The guidelines are aimed at manufacturers and distributors when bringing retail banking products to market.

Publication of the guidelines follows a first phase of work on causal drivers of conduct failure carried out by the Joint Committee of the European Supervisory Authorities (ESAs) in 2013. The EBA's final guidelines reflect a second phase of work and are intended to provide a framework for robust and responsible product design and distribution to avoid future cases of detriment, ensure good consumer outcomes and help re-establish confidence in the banking sector.

The guidelines include feedback on responses received to the EBA's consultation on its draft guidelines launched in November 2014 and outline:

- requirements for manufacturers, in particular:
  - internal controls;
  - identification of the target market;
  - product testing;
  - disclosure;
  - product monitoring;
  - remedial actions;
  - distribution channels; and
- requirements for distributors, including:
  - governance arrangements;
  - knowledge of target market; and
  - information requirements.

The guidelines will apply from 3 January 2017.

**MIFID2 and MAR: Article 29 Working Party writes to Commission on data protection considerations for delegated acts**

The Chair of the Article 29 Working Party (WP29), the group of European data protection authorities established under the EU Data Protection Directive (95/46/EC), has written to the Head of Unit for securities markets at the EU Commission Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) in relation to technical advice submitted by the European Securities and Markets Authority (ESMA) to the Commission on possible delegated acts under MiFID2 and the Market Abuse Regulation (MAR). The letter sets out some of the key data protection and privacy issues identified by WP29 in the proposed implementing measures included in the technical advice following discussion with ESMA at the WP29 financial matters subgroup meeting on 20 April 2015.

The letter responds to an invitation at that meeting for WP29 to present further guidance to DG FISMA to assist the Commission in making final policy decisions.

**EMIR: ESMA updates list of authorised CCPs and public register on clearing obligation**

The European Securities and Markets Authority (ESMA) has updated its list of central counterparties (CCPs) that have been authorised to offer services and activities in the EU in accordance with the European Market Infrastructure Regulation (EMIR) and its public register for the clearing obligation. This update sees the extension of the activities and services of Eurex Clearing AG. Eurex Clearing AG was first authorised on 10 April 2014. It has been re-authorised to clear OTC inflation swaps.

**ISDA publishes EMIR Classification Letter and guidance note**

The International Swaps and Derivatives Association (ISDA) has published the ISDA EMIR Classification Letter and accompanying guidance note. The letter provides a bilateral method for parties to notify each other of their classifications for clearing, risk mitigation obligations and other requirements under EMIR.

The letter replicates a tool on ISDA Amend, the online service from ISDA and Markit that facilitates compliance with certain EMIR and other regulatory requirements. Both the letter and the guidance note are available on ISDA's EMIR Documentation Initiative page.

**BCBS consults on revised guide to account opening**

The Basel Committee on Banking Supervision (BCBS) has published a consultation draft of its revised general guide to account opening, which is intended to update its guidance published in 2003. The finalised guide will be inserted as an annex to the BCBS guidelines for the sound management of risks related to money laundering and financing of terrorism, published in January 2014, and will sit alongside the three existing annexes, which include the list of relevant standards issued by the Financial Action Task Force (FATF). The revised draft of the general guide is intended to support banks when implementing FATF standards on account opening and takes into account the significant enhancements to FATF recommendations since 2003.

In particular, the revised guide highlights mechanisms that banks can use in developing an effective customer identification and verification programme at account opening and discusses information that will help a bank compete a customer risk profile. As an annex to the 2014 guidelines, the guide is also intended to be read in conjunction with the guidelines and if necessary should be adapted for identified specific risk situations.

Comments on the consultation draft are due by 22 October 2015.

**BCBS publishes final guidelines on identifying and dealing with weak banks**

The BCBS has published final guidelines for identifying and dealing with weak banks, superseding 2002 supervisory guidance. In the guidelines, the BCBS identifies a weak bank as one with impaired liquidity or solvency or an institution that will soon be impaired unless there is a major improvement in its financial resources, risk profile, business model, risk management systems and controls and/or quality of governance.

The guidelines are intended to help supervisors mitigate the incidence of weak banks and provide a toolkit for problem identification, corrective action, resolution techniques and exit strategies. Updates to the 2002 guidance include further emphasis of:

- early intervention measures and the use of recovery and resolution tools; and
- liquidity shortfalls, excessive risk concentrations, misaligned compensation and inadequate risk management.

**BCBS publishes progress report on supervisory colleges**

The BCBS has published a progress report on the implementation of principles for effective supervisory colleges. BCBS published of a revised set of principles in 2014 and continues to monitor the functioning of colleges, which are intended to play a key role in enhancing the supervision of global systemically important banks (G-SIBs) and other internationally active banking groups.

The progress report sets out a summary of BCBS' monitoring approach, includes a sample of the challenges faced by supervisors in running effective supervisory colleges and discusses practical approaches taken to address them. Among its findings, BCBS reports that:

- the functioning of colleges has continued to improve including improved interaction with firms;
- overall, supervisors intend to continue enhancing the effectiveness of colleges; and
- many firms have indicated that they would like to receive more feedback on college discussions.

**FCA publishes finalised guidance and rules on concurrent competition powers**

The Financial Conduct Authority (FCA) has published a final policy statement, guidance and Handbook amendments in relation to concurrent competition powers for financial services, alongside the Competition and Markets Authority (CMA), which the FCA acquired on 1 April 2015. The competition powers enable the FCA to enforce the prohibitions of anti-competitive behaviour set out in the Competition Act 1998 and the Treaty on the Functioning of the European Union (TFEU) in relation to financial services and grant additional powers to the FCA in order that it can conduct market studies and make market investigation references (MIRs) to the CMA under the Enterprise Act 2002.

The policy statement (PS15/18) sets out the FCA's feedback on the responses it received to its consultation (CP15/01) on the concurrent powers and blackline versions of the final rules against the consultation drafts. Alongside the policy statement, the FCA has published its finalised guidance on:

- how the FCA will carry out enforcement action (FG15/8); and
- market studies and MIRs (FG15/9), in particular how the FCA will choose to exercise its powers, how studies will be carried out, disclosure of information in market studies and how it will make MIRs.

The FCA has also published its final legislative instrument introducing minor Handbook amendments in relation to rules on disclosure of competition law infringements to the FCA, which have effect from 1 August 2015.

**Ring-fencing: FCA consults on customer disclosure rules for non-ring-fenced bodies**

The FCA has launched a consultation on draft rules to implement requirements for disclosures to consumers by non-ring-fenced bodies (NRFBs) or institutions with an exemption from the ring-fence after the implementation of the ring-fencing regime in 2019. The rules will require NRFBs to provide information on their investment or commodities trading activities and details of any other actions that would be prohibited for ring-fenced bodied (RFBs) under the Financial Services and Markets Act 2000 (Ring-fenced Body and Core Activities) Order 2014 to account holders with assets of at least GBP 250,000 and consumers applying to open an account.

Comments on the consultation are due by 13 November 2015.

**Transparency: Bank of Italy publishes new regulation on transparency requirements**

The Bank of Italy has published a new regulation to amend and update the Bank of Italy Regulation on transparency dated 29 July 2009, as amended and integrated from time to time. The new regulation is intended, amongst other things, to align second-level provisions with the changes made to the primary legislation over the last few years and to streamline certain transparency obligations applicable to banking, payment and e-money services offered by credit institutions, financial intermediaries, payment institutions and e-money institutions.

The new regulation comes into force on 1 October 2015. Credit institutions, financial intermediaries, payment institutions and e-money institutions providing the above mentioned services in Italy are requested to adapt their internal procedures (as the case may be) by the time the new regulation comes into force.

**New rules on mandatory security deposit enter into force in Poland**

A bill amending the Act on Trading in Financial Instruments has entered into force. The new regulations will change the way retail customers of investment firms invest in derivatives which are not cleared by a CCP. The bill

establishes the minimum amount of the required security deposit necessary for the execution of instructions placed by a retail customer with an investment firm to acquire or sell derivatives. The Act establishes the amount of the deposit at 1% of the nominal value of a financial instrument, i.e. it limits the use by investment firms of financial leverage to a ratio of 1:100.

An exception to the rule has been made in the case of instructions to sell options resulting in the issuance of options. In this case, the required security deposit should amount to no less than the premium calculated by the investment firm using a recognised option valuation model, made available to the retail customer, increased by 1% of the nominal value of the option.

**HKEx revises guidance on documentary requirements and administrative matters for collective investment schemes applications**

Hong Kong Exchanges and Clearing Limited (HKEx) has revised its guidance on documentary requirements and administrative matters for collective investment schemes (CIS) applications in light of the waiver of stamp duty for the transfer of units of all exchange traded funds (ETFs).

With effect from February 2015, stamp duty is waived for the transfer of units of all ETFs, regardless of their underlying portfolios, dates of listings or whether stamp duty has been remitted in respect of them. Consequently, procedures to facilitate CIS applicants to obtain the stamp duty remission are no longer necessary.

**Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules take effect**

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have issued circulars to inform authorised institutions and licensed corporations of the commencement of the Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules (Reporting Rules). To help market participants better understand how the Reporting Rules operate, the HKMA and the SFC have also published a set of frequently asked questions (FAQs) that provide additional information about the mandatory reporting and record keeping obligations under the new regime.

The HKMA has issued directions and instructions for using the HKMA's Electronic Reporting System for submission of transaction information under the Reporting Rules. The directions and instructions can be accessed at the Hong Kong Trade Repository (HKTR) info page on the HKMA website. For licensed banks that have already been reporting OTC derivative transactions to the HKTR under the interim reporting requirements, the HKMA has highlighted its circular published 11 June 2015 on transition arrangements.

The SFC circular advises licensed corporations whose activities may render them subject to the mandatory reporting obligation to refer to the FAQs and HKMA directions and instructions in order to ensure compliance with their reporting and record keeping obligations.

**SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015 published**

The Securities and Exchange Board of India (SEBI) has published the SEBI (Issue and Listing of Debt Securities by Municipalities) Regulations, 2015, to put in place a framework for the public issue of debt securities by municipalities, listing and trading of such securities and matters incidental thereto. Amongst other things, the regulations set out the following:

- eligibility criteria for issuing debt securities;
- requirements and conditions relating to the public issue and private placement of debt securities;
- requirement for fair and material disclosures in the offer document;
- conditions for listing of debt securities issued on private placement bonds;
- continuous listing conditions; and
- obligations of intermediaries and issuers.

The regulations shall come into force on the date of their publication in the official gazette of India.

**OJK issues guidelines for financial services institutions on repo trading**

Indonesia's Financial Services Authority, Otoritas Jasa Keuangan (OJK), has issued Regulation No.9 of 2015 on the Guidelines for Financial Services Institutions Carrying Out Repurchase Agreement Transactions, which will come into force on 1 January 2016.

The guidelines apply to financial services institutions that intend to carry out repo trading for scripless securities, either debt or equity, which are regulated and supervised by the OJK, and registered at, and settled through, Bank Indonesia and/or the Custodian and Settlement Institution,

Kliring Penjaminan Efek Indonesia (KPEI). Under the guidelines, a repo transaction must, among other things:

- effect a change of ownership over the securities; and
- comply with the standards of Indonesia's GMRA issued by the OJK or other party(ies) acknowledged by the OJK.

Financial services institutions are required to submit a report to:

- the OJK, if the repo transaction involves debt securities; or
- the KPEI, if the repo transaction involves equity securities.

Any party who fails to comply with the provisions in the Regulation will be subject to penalties, ranging from written warnings through to revocation of business licence/annulment of registration.

**MAS responds to feedback from consultation on enhancements to the regulatory regime governing REITS and REIT Managers**

The Monetary Authority of Singapore (MAS) has published its response to feedback received on its consultation published on 9 October 2014, which set out proposals to enhance the regulatory regime governing Real Estate Investment Trusts (REITs) and REIT managers.

In its response, the MAS has confirmed that in order to strengthen corporate governance:

- REIT managers and their directors will be bound by a statutory duty to prioritise the interests of REIT unitholders over the interests of the REIT managers and their shareholders, in the event of a conflict of interest;
- at least half of the board of directors of a REIT manager must be independent directors if unitholders do not have the right to appoint directors. This requirement can be reduced to one-third if the unitholders are given the right to appoint the directors;
- REIT managers will be required to disclose their remuneration policies and procedures for setting remuneration of directors and executive officers in the REITs' Annual Reports; and
- a minimum of three directors will be required to form the audit committee of a REIT manager.

MAS has also confirmed measures to:

- require REIT managers to disclose the justification for each type of fee charged and explain the methodology for computing performance fees in order to increase transparency, as well as requirements for REIT managers to justify how this methodology takes into account REIT unitholders' long-term interests; and
- an increase in the development limit of a REIT from 10% to 25% of its deposited property in order to allow greater operational flexibility. Furthermore, the leverage limit imposed on a REIT will be increased from 35% to 45% of the REIT's total assets, but a REIT will no longer be allowed to leverage up to 60% with a credit rating.

**Financial Advisers (Amendment) Bill 2015 and Insurance (Amendment) Bill 2015 moved for second reading in Parliament**

The Financial Advisers (Amendment) Bill 2015 and the Insurance (Amendment) Bill 2015 have been moved for their second reading in Parliament. The key amendments under the Financial Advisers (Amendment) Bill 2015 include the following:

- improving the remuneration structure of the financial advisory industry by requiring financial advisers to implement a remuneration framework that also incorporates non-sales key performance indicators. The MAS will also be vested with powers to regulate the payment and receipt of remuneration of financial advisers, representatives and supervisors;
- making the provision of financial advisory services a dedicated profession by allowing the MAS to restrict licensed financial advisers and their representatives from conducting non-financial advisory activities which conflict with their financial advisory roles, result in a neglect of their financial advisory duties, or bring disrepute to the industry;
- strengthening the regulation of insurance broking firms conducting financial advisory activities by empowering the MAS to prescribe or vary the financial or professional indemnity insurance requirements for insurance brokers which are similar to those currently imposed on licensed financial advisers; and
- empowering the MAS to approve inspections of financial advisers in Singapore by their foreign parent regulatory authorities.

The changes proposed in the Insurance (Amendment) Bill 2015 are intended to complement the changes proposed in the Financial Advisers (Amendment) Bill 2015. The key amendments under the Insurance (Amendment) Bill 2015 include the following:

- regulating the payment of remuneration by limiting upfront commissions and spreading the total commissions paid on a life policy over a specified period;
- launching a web aggregator for life insurance policies that enables consumers to compare the premiums, key benefits and features of life policies from different insurers;
- requiring insurers to submit information for the web aggregator and to specify the fees payable by insurers for the development, operation and maintenance, and use of the web aggregator; and
- empowering the MAS to prescribe matters relating to the manufacture and offer of life policies, such as their characteristics, benefits and manner of distribution or sale, where it is in the public interest to do so.

**APRA releases information paper on outsourcing involving shared computing services**

The Australian Prudential Regulation Authority (APRA) has released an information paper on prudential considerations and key principles in relation to outsourcing involving shared computing services, including cloud services.

APRA has noted that the use of shared computing services is increasing and expected to continue to evolve in its volume and complexity.

The information paper identifies several risks associated with shared computing services and outlines various prudential considerations and key risk management and mitigation principles that APRA-regulated entities should consider when contemplating the use of shared computing services.

The information paper notes that in APRA's view, the use of public cloud arrangements have not reached a level of maturity commensurate with usages having an extreme impact if a disruption occurs. APRA regulated entities are encouraged to consult with APRA prior to entering into an outsourcing arrangement involving heightened risk.

## RECENT CLIFFORD CHANCE BRIEFINGS

**Clifford Chance Comment: Iran Sanctions Deal – What to Expect, and When**

On 14 July 2015, the 'E3/EU+3' countries (China, France, Germany, the Russian Federation, the United Kingdom and the United States, together with the High Representative of the European Union for Foreign Affairs and Security Policy) and Iran agreed a Joint Comprehensive Plan of Action (JCPOA) on Iran's nuclear programme.

Under the terms of the JCPOA, there will be a phased lifting of all UN Security Council (UNSC) sanctions as well as multilateral and national sanctions related to Iran's nuclear programme, including steps on access in areas of trade, technology, finance and energy. In exchange, Iran has agreed never to 'seek, develop or acquire any nuclear weapons', a promise to be backed by detailed inspections and monitoring.

This briefing paper discusses the Joint Comprehensive Plan of Action.

http://www.cliffordchance.com/briefings/2015/07/iran_sanctions_dealwhattoexpectandwhen.html

**Anti-Bribery and Corruption Review**

Prosecutions for bribery and corruption continue to attract media headlines around the world and, in response, international companies continue to review what they have to do to address the risks to their business, and to their reputation. Fundamental to this is staying on top of relevant legislative developments and enforcement trends in the countries in which they operate. Some national authorities have even highlighted this information gathering as a regulatory requirement for directors and senior corporate officers.

This briefing paper looks at the Anti-Bribery and Corruption Review and the recent developments in some of the jurisdictions around the world where we have offices, focusing particularly on changes to legislation, both recent and proposed, and on prosecutions and enforcement trends.

http://www.cliffordchance.com/briefings/2015/07/anti-bribery_andcorruptionreview-july2015.html