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Briefing note

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International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +1 212 878 3119

Marc Benzler +49 69 7199 3304

Steven Gatti +1 202 912 5095

Mark Shipman + 852 2826 8992

Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

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

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

AIFMD: ESMA issues advice on extension of passport to non-EU jurisdictions and opinion on functioning of passport for EU AIFMs and NPPRs

The European Securities and Markets Authority (ESMA) has published its advice on the extension of the Alternative Investment Fund Managers Directive (AIFMD) passport to non-EU alternative investment fund managers (AIFMs) and alternative investment funds (AIFs) and an opinion on the functioning of the passport for EU AIFMs and the national private placement regimes (NPPRs).

The current AIFMD passport is only available to EU entities, while non-EU AIFMs and AIFs are currently subject to EU NPPRs. ESMA selected six jurisdictions for assessment for its advice based on a number of factors including the amount of activity already being carried out by entities under the NPPRs: Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the US. ESMA concluded that there are no obstacles to extending the passport to Guernsey and Jersey, and that Switzerland will remove any remaining obstacles with the enactment of pending legislation. ESMA has not reached a definitive view on Hong Kong, Singapore or the US due to concerns raised related to competition and regulatory issues. ESMA aims to finalise the assessments of these remaining jurisdictions as soon as practicable and to assess further groups of non-EU countries until it has provided advice on all the non-EU countries that it considers should be included in the extension of the passport.

ESMA's opinion on the functioning of the EU passport and the NPPRs covers its preliminary assessment of the operation of these two mechanisms. ESMA considers that the delay in implementation of the AIFMD together with the delay in the transposition in some Member States make a definitive assessment difficult, and suggests the preparation of another opinion on the functioning of the passport after a longer period of implementation in all Member States.

In its opinion, ESMA identifies several issues relating to the use of the EU passport:

- divergent approaches with respect to marketing rules;
- varying interpretations of what constitutes a 'professional investor' and 'material changes' under the AIFMD passport in different Member States.

ESMA's view is that there is insufficient evidence to indicate that the EU passport has raised major issues in terms of the functioning and implementation of the AIFMD framework but recommends a further opinion after a longer period of implementation.

The advice and opinion have been sent to the EU Commission, EU Parliament and the EU Council for consideration on whether to activate the relevant provision in the AIFMD extending the passport through a Delegated Act.

ELTIF Regulation: ESMA consults on draft RTS

ESMA has issued a consultation on draft regulatory technical standards (RTS) under the Regulation on European Long-term Investment Funds (ELTIFs). The consultation sets out ESMA's draft proposals on:

- criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purposes;
- circumstances in which the life of an ELTIF is considered sufficient in length;
- criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets; and
- costs disclosure and the facilities available to retail investors.

Comments are due by 14 October 2015. ESMA will consider the responses to the consultation and finalise the draft RTS to be submitted to the EU Commission for endorsement.

EMIR: ESRB reports to Commission on review

The European Systemic Risk Board (ESRB) has published two reports on issues to be considered in the EU Commission's review of the European Market Infrastructure Regulation (EMIR), which is required by 17 August 2015.

The first report, focusing on issues other than the efficiency of margining requirements, makes recommendations for EMIR to include provision for:

- enabling a swift process for the removal or suspension of mandatory clearing obligations for certain classes of OTC derivatives if necessary;
- the European Securities and Markets Authority (ESMA) to evaluate systemic risks for mandatory clearing purposes at both the EU and national level;
- enhancing the EMIR calibration by aligning the amount of skin-in-the-game held by a central counterparty (CCP) with the level of the CCP's clearing activity and, with regard to default fund provisions, further clarity on the timing and procedures for CCPs to follow for the replenishment of funds;

- a legal obligation for CCPs to publish quantitative and qualitative requirements consistent with the CPMI-IOSCO disclosure framework;
- amending EMIR Art. 88 in order to require ESMA to publish a list of all approved interoperability arrangements between CCPs on its website along with the financial instruments for which these links are allowed to be used; and
- broadening access rights to trade repository data.

A report on the efficiency of margining requirements to limit pro-cyclicality and the need to define additional intervention capacity in this area, which also considers haircut requirements, sets out the ESRB's view that overall anti-cyclical contribution to the EMIR legal framework could be significantly enhanced. Among other things, it makes recommendations for:

- providing clear guidance on the parameters to be used by CCPs;
- a documented policy by CCPs on the overall tolerance for pro-cyclicality;
- more granular transparency requirements on pro-cyclicality; and
- a definition of pro-cyclicality in the EMIR level 1 text.

Moreover, the ESRB makes a proposal to further review EMIR in 2018, specifically on the macroprudential use of margining to address and prevent systemic risks.

EBA publishes key metrics for EU G-SIIs

The European Banking Authority (EBA) has published the key metrics used to identify global systemically important institutions (G-SIIs) in the EU. The data is presented in tables and graphs for the 37 largest EU institutions which had 2014 leverage ratio exposures in excess of EUR 200 billion. While the data is in line with the internationally agreed framework developed by the Financial Stability Board (FSB) and Basel Committee on Banking Supervision (BCBS), the EBA's disclosure includes some institutions that did not contribute directly to the BCBS' annual exercise for global systemically important banks (G-SIBs).

The data relates to the size, interconnectedness, substitutability, complexity and cross-jurisdictional activity of each institution. The EBA intends to publish this data annually.

EBA consults on cooperation agreements between deposit guarantee schemes

The EBA has published for consultation draft guidelines on cooperation agreements between deposit guarantee schemes (DGSs). The guidelines are intended to specify the objectives and minimum content of cooperation agreements, which are required between DGSs, or the relevant designated authority, under the Deposit Guarantee Schemes Directive (DGSD 2).

The guidelines include a draft multilateral framework cooperation agreement in order that DGSs are not required to sign a large number of bilateral agreements. However, the guidelines allow for DGSs to sign bilateral agreements where it is preferable to go beyond the minimum content contained in the draft guidelines.

The guidelines focus on issues in relation to:

- repayments to depositors by a host DGS at branches of credit institutions headquartered in another Member State;
- transferring contributions from one DGS to another in circumstances that a credit institution joins a different DGS;
- mutual lending between DGSs; and
- repayments to depositors for cross-border institutions.

Comments are due by 29 October 2015.

CRR: Commission Implementing Regulation on amendments to ITS for supervisory reporting published in Official Journal

Commission Implementing Regulation (EU) 2015/1278, which amends Implementing Regulation (EU) 680/2014 on implementing technical standards (ITS) with regard to the instructions, templates and definitions for supervisory reporting of institutions under the Capital Requirements Regulation (CRR), has been published in the Official Journal.

The Commission Implementing Regulation is intended to provide greater precision to the templates, instructions and definitions used for supervisory reporting and sets out several replacement templates and amended instructions.

The Commission Implementing Regulation applies from 1 June 2015.

FSB publishes second annual report

The Financial Stability Board (FSB) has published its second annual report, which contains the FSB's financial

statements for the 12-month period from 1 April 2014 to 31 March 2015 as well as an overview of its ongoing work relating to global financial sector reforms.

Amongst other things, the report indicates that the FSB:

- is conducting impact assessment studies to determine the final calibration of the TLAC with assistance from the Basel Committee on Banking Supervision (BCBS) and the Bank for International Settlements (BIS), and a revised TLAC standard will be published in advance of the G20 Summit in November 2015;
- is finalising guidance for the design of statutory recognition frameworks and contractual recognition provisions intended to prevent cross-border derivative contracts being disruptively terminated in the event of a G-SIB entering resolution; and
- is pursuing a work plan coordinated with other standard setters to promote CCP resilience, recovery planning and resolvability.

FSB publishes ninth progress report on OTC derivatives market reforms

The FSB has published its ninth progress report on implementation of over-the-counter (OTC) derivatives market reforms.

The report finds that:

- implementation of reforms is most advanced for trade reporting and for higher capital requirements for non-centrally cleared derivatives;
- there has been further incremental progress to promote central clearing of standardised OTC derivatives;
- few jurisdictions have regulatory frameworks in place to promote execution of standardised contracts on organised trading platforms;
- most jurisdictions are only in the early phases of implementing the Basel Committee on Banking Supervision – International Organization of Securities Commissions (BCBS-IOSCO) framework for margin requirements for non-centrally cleared derivatives (internationally agreed phase-in periods have been delayed and now begin in September 2016); and
- the availability and use of centralised infrastructure to support OTC derivatives reforms continues to expand.

The FSB has invited feedback on the report by 24 August 2015.

FSB delays methodologies on NBNI G-SIFIs

The FSB has announced that it will wait until its current work on financial stability risks from asset management activities is completed before finalising the assessment methodologies for non-bank non-insurer global systemically important financial institutions (NBNI G-SIFIs).

The FSB, with the International Organization of Securities Commissions (IOSCO), issued a joint consultation paper on assessment methodologies for NBNI G-SIFIs in March 2015. Since then the FSB has worked on risks associated with market liquidity and asset management activities as well as potential structural sources of vulnerability associated with asset management activities.

The FSB will report to the G20 later in 2015 and develop activities-based policy recommendations as necessary by Spring 2016. Then, jointly with IOSCO, the FSB will further analyse and finalise the NBNI G-SIFI asset management assessment methodology, with a focus on any residual entity-based sources of systemic risk from distress or disorderly failure that cannot be effectively addressed by market-wide activities-based policies.

IOSCO publishes review of timeliness and frequency of disclosure to investors

The International Organization of Securities Commissions (IOSCO) has published the findings of its thematic review into the timeliness and frequency of disclosure by issuers and collective investment schemes (CIS) under IOSCO's Objectives and Principles of Securities Regulation.

The objective of the review was to describe the current range of regulatory approaches of participating jurisdictions in the implementation of Principle 16, relating to issuers, and Principle 26, relating to CIS, of IOSCO's Principles. The review was limited to periodic and material event-based disclosure frameworks in participating jurisdictions, but did not extend to point-of-sale disclosures pertaining to initial or follow-on offering or listing.

In relation to disclosure under Principle 16, IOSCO found differences around whether and when information is required to be disclosed, with requirements varying between the type of issuer and information.

The review also found that timely disclosure requirements on value, risk reward profile, and costs of CIS were in place for all jurisdictions in relation to disclosure under Principle 26.

IOSCO publishes review of implementation progress in regulation of derivative market intermediaries

IOSCO has published a report on its review of implementation progress in regulation of derivative market intermediaries (DMI). In 2012, IOSCO developed DMI standards for the regulation of market participants in the business of dealing, making a market or intermediating transactions in OTC derivatives. The report sets out the findings on the progress jurisdictions have made in adopting legislation, regulation and policies in relation to DMI in six reform areas.

IOSCO found that participating jurisdictions had made significant progress in adopting legislation, regulation or policy in the areas covered by the DMI standards and expects the development of regulatory frameworks should be well progressed or completed by 2016.

MIF Regulation: HMT consults on approach to interchange fee limits and supervisory regime

HM Treasury (HMT) has launched a consultation on UK implementation of the EU Multilateral Interchange Fees Regulation (MIF Regulation), in particular the Government's approach to national discretions in the Regulation and proposed supervisory regime.

Interchange fees are fees paid from a merchant acquirer (a merchant's bank) to a card issuer (a cardholder's bank), which are set as a percentage of the cost of the transaction made by the cardholder and are part of the charges passed on to merchants by merchant acquirers. The MIF Regulation caps interchange fee limits but also provides national discretions in three areas that allow Member States to:

- implement lower interchange fee caps for domestic credit cards transactions than those set in the Regulation;
- implement lower fee caps for domestic debit card transactions than those specified in the Regulation; and
- exempt three-party card schemes that use issuers and/or acquirers from caps for up to three years, provided the scheme holds a domestic market share of less than 3%.

The consultation paper sets out the Government's approach to the national discretions, which include:

- applying the default 0.3% cap for domestic credit card interchange fees in order to align cross-border and domestic fee rates;
- capping domestic debit card fees on the basis of a weighted average at 0.2% across the annual average transaction value of all domestic debit card transactions within each payment card scheme; and
- exercising the exemption for three-party card schemes using issuers/acquirers in order to provide a transitional period in which schemes can adjust their business model.

The consultation paper also sets out that the Government intends to provide the Payment Systems Regulator (PSR) with additional powers in order to supervise compliance with the MIF Regulation, alongside supervisory functions for both the Financial Conduct Authority (FCA) and Trading Standards, as well as putting in place appeals and redress procedures.

The new rules on interchange fee caps will apply from 9 December 2015. Comments on the consultation are due by 29 August 2015.

CRD 4: PRA publishes policy statement on assessing capital adequacy under Pillar 2

The Prudential Regulation Authority (PRA) has published its final policy statement (PS17/15) on assessing capital adequacy under Pillar 2 following a consultation launched in January 2015. The policy statement clarifies the PRA's approach to setting Pillar 2 capital requirements and provides feedback to the consultation responses received from stakeholders.

The policy statement confirms the PRA's approach to Pillar 2A methodologies and Pillar 2B, reporting requirements and implementation of the rules. The methodology proposed by the PRA for Pillar 2A, which relates to risks not captured either fully or in part by capital requirements, have been refined to make them more transparent and risk sensitive. The policy statement also sets out that the PRA will replace the capital planning buffer with a new PRA buffer, which is intended to harmonise the PRA's approach with CRD 4. The PRA expects to write to all firms before 1 January 2016 to convert their existing capital planning buffer to the PRA buffer that offsets against the CRD 4 combined buffer.

In an annex to the policy statement, the PRA has published its instrument on Pillar 2 reporting for the PRA Rulebook. Alongside the policy statement, the PRA has also published:

- a supervisory statement (SS31/15) on the Internal Capital Adequacy Assessment Process (ICAAP) and the Supervisory Review and Evaluation Process (SREP), which provides further detail on the PRA's expectations in relation to the ICAAP, including coverage and treatment, and stress testing, scenario analysis and capital planning. It also explains the PRA's approach to setting the Individual Capital Guidance (ICG) and PRA buffer;
- a statement of policy on methodologies for setting Pillar 2 capital; and
- a supervisory statement (SS32/15) on Pillar 2 reporting, including instructions for completing data items.

The new Pillar 2 framework will come into force on 1 January 2016.

FCA reports on consumer protections for unauthorised transactions

The Financial Conduct Authority (FCA) has published a thematic review of the treatment customers receive when they are the victim of an unauthorised transaction, which is a payment made from a customer's current account or credit card without their consent. The review involved assessments of ten regulated firms providing current accounts and/or credit cards to observe consumer protections in place, as well as independent consumer research.

The review focussed on the processes used by firms to decide when to refund customers and also assessed:

- customer communications;
- detection measures;
- customer experience; and
- governance, oversight and measuring outcomes.

The final report sets out examples of good practice identified in the review and areas that firms should consider further.

Benchmarks: FCA publishes thematic review of oversight and controls

The FCA has published a thematic review of firms' oversight and controls in relation to financial benchmarks.

The review recommends that firms:

- continue to strengthen governance and oversight of benchmark activity;
- continue to identify and manage conflicts of interest;
- fully identify their benchmark activities across all business areas;
- establish oversight and controls for any in-house benchmarks where they have not done so; and
- implement appropriate training programmes.

The FCA is writing to all firms involved in the review to provide individual feedback and will be following up on this work as part of its regular supervision of firms.

BoE consults on new sterling money market data collection and SONIA reform

The Bank of England (BoE) has published a consultation document setting out plans for a new sterling money market data collection. The consultation also sets out how the BoE plans to use this data to reform the Sterling Overnight Index Average (SONIA) benchmark interest rate.

Comments are due by 1 October 2015. The BoE anticipates that it will be in a position to consult on detailed plans for the reform of SONIA in Q2 2016.

Italian Treasury publishes draft legislative decrees implementing BRRD

Further to the publication of the law (Legge di delegazione europea 2014) mandating the Italian Government to implement, amongst others, the Bank Recovery and Resolution Directive (BRRD) in Italy, the Italian Treasury has launched a consultation on two draft legislative decrees intended to:

- implement the BRRD in Italy; and
- amend Legislative Decree no. 385 of 1 September 1993 (Italian Banking Act) and Legislative Decree no. 58 of 24 February 1998 (Italian Financial Act) accordingly.

ACCC grants interim authorisation to Australian Retail Credit Association Principles

The Australian Competition & Consumer Commission has advised the market of its intention to grant authorisation, for five years, to the Australian Retail Credit Association in relation to the Principles of Reciprocity and Data Exchange. The Principles are a system for exchanging comprehensive consumer credit data between credit reporting bodies and credit providers.

In the past, only negative information such as defaults was allowed to be disclosed by credit providers. However, under the amendments to the Privacy Act 1998 (Cth) in March 2014, positive information (comprised of repayment history information and information about the consumer's credit accounts) is now able to be collected and disclosed. This information is used by credit providers (and consumers) to indicate an individual's or business' credit worthiness (such as in the form of a 'credit score').

The proposed authorisation will allow credit providers such as banks and other financial institutions to provide comprehensive credit reporting data on an individual, as envisioned under extensive amendments to the Privacy Act 1988 (Cth), to credit reporting bodies to determine credit ratings.

The ACCC is satisfied that authorising the relevant provisions of the Principles is likely to result in public benefits that would outweigh any likely public detriments. However, the ACCC has raised potential concerns in relation to recording and reporting hardship arrangements and settlement of defaults. The ACCC is currently accepting submissions from the market on this issue.

Federal agencies to provide guidance for resolution plans

In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act, 115 US bank holding companies with less than USD 100 billion in total nonbank assets and foreign-based firms with less than USD 100 billion in US nonbank assets were required to file their second resolution plans with the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC) in December 2014, and four foreign-based firms were required to file their initial resolution plan.

Following a review of the resolution plans, the agencies are providing each firm with guidance, clarification, and direction for their upcoming resolution plans based on the relative size and scope of each firm's US operations. The new plans are due to the agencies on or before 31 December 2015. Plan requirements are tiered with less complex firms filing more streamlined plans. According to a joint agency release:

- 29 of the more complex firms are required to file either full or tailored resolution plans that take into account guidance identified by the agencies; and
- 90 firms with limited US operations may file plans that focus on material changes to their 2014 resolution plans, actions taken to strengthen the effectiveness of those plans, and, where applicable, actions to ensure any subsidiary insured depository institution is adequately protected from the risk arising from the activities of nonbank affiliates of the firm.

In addition, the agencies have released an updated tailored resolution plan template. The optional template is intended to facilitate the preparation of tailored resolution plans that focus on the nonbanking operations of the firm and on the interconnections and interdependencies between the nonbanking and banking operations.