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Briefing note

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EMIR: ESMA consults on review of RTS on CCP client accounts

The European Securities and Markets Authority (ESMA) has published a discussion paper on the review of Article 26 of its regulatory technical standards (RTS) No 153/2013 under the European Markets Infrastructure Regulation (EMIR). The paper questions whether it would be appropriate to revise the current regulatory standard in Article 26 with respect to client accounts in order to allow

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central counterparties (CCPs) authorised under EMIR to apply a one-day liquidation period for financial instruments other than over-the-counter (OTC) derivatives, only where margins on client accounts are calculated on a gross basis.

Comments are due by 30 September 2015.

EMIR: European System of Central Banks reports on CCPs' access to central bank liquidity facilities

The European System of Central Banks (ESCB) has published a report on possible measures to facilitate the access of CCPs to central bank liquidity facilities.

The report concludes that introducing requirements in EMIR regarding CCP access to central bank facilities would not be appropriate. It emphasises that central banks need to be in control of financial risks and warns that an automatic right to central bank liquidity could create moral hazard. Therefore, the ESCB supports the current legal framework.

PSR publishes approach to setting 2015/16 fee levels and consults on collection methodology within payment systems

The Payment Systems Regulator (PSR) has published a document setting out its final approach to allocating and setting fee levels for each regulated payment system and launched a consultation on the process for calculating and collecting fees from participants in each regulated payment system.

The PSR has announced that its 2015/16 annual funding requirement will be GBP 28.1 million, which was previously set out in the PSR's annual plan, and consists of GBP 12.2 million of costs incurred setting up the PSR and GBP 15.9 million to cover the regulator's 2015/16 budget. The document includes the PSR's policy on allocation between the regulated payment systems and fee levels for 2015/16. The PSR has decided to implement the allocations policy set out in its March 2015 consultation paper and allocate fees equally between pan-UK payment systems, with the two regional cheque systems counted as a single system for fee allocation purposes.

The PSR is also seeking views on the calculation and collection methodologies within payment systems. The PSR previously consulted on an approach that would involve billing operators, but the PSR has decided that the consequences would unintentionally increase the cost of regulation on firms. The PSR is now proposing an indirect billing approach, under which regulatory fees paid by payment service providers (PSPs) with direct access to regulated payment systems would be outside the scope of VAT and would ensure that operators are not required to hold additional regulatory reserves.

Comments on the consultation are due by 17 September 2015. The PSR intends to publish its final approach on fee calculation and collection in a policy statement in the second half of October 2015.

Anti-money laundering/counter terrorist financing: BIS reviews impact of UK regime on business

The Department for Business, Innovation and Skills (BIS) has launched a review into the impact on business of the current anti-money laundering (AML) and counter terrorist financing (CTF) regime as part of its Cutting Red Tape programme, which is intended to assess whether legislation or its implementation may be improved or simplified. The first phase of the Cutting Red Tape programme will focus on problems identified as part of the Red Tape Challenge and Business Focus on Enforcement programmes in the last Parliament. The Cutting Red Tape programme was launched with reviews of agriculture, care homes, energy, mineral extraction and waste on 16 July 2015.

The review of the AML/CTF regime focuses in particular on impacts on the financial services industry and businesses that are asked to comply with AML requirements set by banks and financial institutions. The review seeks feedback on the role of supervisors and current implementation of the AML/CTF regime under the Money Laundering Regulations 2007. Of particular interest to the BIS is whether there are ineffective requirements imposed on business through current legislation or supervision, including in relation to proportionality, international comparability and examples of good supervisory practice.

Moreover, the review notes the finalisation of the fourth Anti-Money Laundering Directive (AMLD 4 – 2015/849), which the Government will transpose into domestic law through updated AML regulations by June 2017. The Government intends to share evidence provided as part of the Cutting Red Tape review with relevant departments when consulting on implementation of AMLD 4.

Comments on the review are due by 23 October 2015.

Recovery and resolution: Ordinance implementing BRRD and DGSD2 in France published

An Ordinance implementing the Banking Recovery and Resolution Directive (BRRD) and the recast Deposit Guarantee Scheme Directive (DGSD2) has been published.

The Ordinance adapts provisions of the Monetary and Financial Code in light of the entry into force of the European Regulation on the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF) which will apply in the framework of the Banking Union.

It also adapts the financing and operating rules of the resolution and deposit guarantee fund, reflecting the strengthening of its role in investor protection and in banks' crisis management. It makes these provisions applicable, with adaptations if necessary, in Pacific territories (which are not part of the European Union).

Systemic risk buffer formally imposed in The Netherlands

An amendment to the 'Regeling Specifieke bepalingen CRD IV en CRR' of the Dutch Central Bank (DNB) has been published. In line with a previous announcement the amendments relate to, amongst other things:

- the imposition of a systemic risk buffer (SRB) of 3% on banks exposed to systemic risk. In The Netherlands, the 3% SRB will apply to ABN AMRO Bank, ING Bank and Rabobank. The SRB will be phased-in and will fully apply from 1 January 2019; and
- DNB pre-approval for AT1- and T2 capital instruments, which will no longer be required. The competent authority will not approve the instruments before their issue, but has the power to test capital qualification during the life of the instruments. The DNB has warned that no assurance can be given that any such test will not result in disqualification.

The amendments entered into force on 28 August 2015.

German Federal Government proposes draft law implementing Payment Accounts Directive

The German Federal Government (Bundesregierung) has proposed a draft law on the implementation of the Payment Accounts Directive (Directive 2014/92/EU, PAD). The draft law imposes duties pursuant to the PAD, which include the duty to offer basic payment accounts for CRR credit institutions, branches of EU credit institutions and third country branches. Only those banks shall be required to offer basic payment accounts that already offer payment accounts for consumers. Furthermore, the draft law is intended to make it easier for consumers to change payment account provider.

FINMA launches consultation on draft FINMA Financial Market Infrastructure Ordinance

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on the draft FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA). The draft FMIO-FINMA contains implementing provisions of the Financial Market Infrastructure Act (FMIA) passed by the Swiss Parliament on 19 June 2015, which introduces new mandatory clearing and disclosure requirements in relation to OTC derivatives trading. The draft FMIO-FINMA sets out the criteria that determine the types of OTC derivatives subject to mandatory clearing, requiring clearing via a central counterparty in line with recognised international standards.

Additional changes include:

- the current disclosure of interests regime for securities is extended to financial instruments, including foreign financial instruments with Swiss listed stock as underlying; and
- the introduction of a separate disclosure obligation for shares by both the owner and the person to whom the exercise of voting rights has been delegated.

The consultation ends on 2 October 2015.

HKEx amends trading rules of stock and futures exchanges

Hong Kong Exchanges and Clearing Limited (HKEx) has updated the trading rules of the stock and futures exchanges by amending:

- the Options Trading Rules of the Stock Exchange to enable the Stock Exchange of Hong Kong Limited (SEHK) to enter into arrangements with overseas regulators where the SEHK board considers that the arrangements are conducive to the object of the market and to prescribe conditions for the use of such arrangements by options exchange participants; and
- the Rules, Regulations and Procedures of the Futures Exchange to enable Hong Kong Futures Exchange Limited (HKFE) to prescribe conditions for the use of arrangements that are conducive to the object of the market which HKFE has entered into with overseas regulators pursuant to HKFE Rule 309(c).

The amendments are effective from 27 August 2015.

Korean Government announces measures to ease regulation in economic zones to attract foreign investment

The Korean Government has announced measures to ease regulations for companies that invest in economic zones, which are intended to boost foreign investment. Investors who build factories in free economic zones (FEZs) will no longer have to go through environmental impact assessments twice if they meet the requirements the first time. Companies that operate in free trade zones (FTZs), a slightly different type of factory site, will now have simplified procedures for transactions and trade reports. The number of permitted non-Korean workers will also be increased.

The government has indicated that it also intends to create a more business-friendly environment for foreign investors. It will provide exemptions from confirmation by the heads of the customs service for companies that fully abide by the laws related to import and export permissions. Paper documents for export and import declarations will be replaced with electronic forms. Finally, in order to boost trade with China and Japan, Korea will build more ports and docking facilities for ferries that can carry trucks. A joint logistics center will be built near Incheon International Airport. In cooperation with the Chinese customs service, Korea will further allow all companies to use a simplified, electronic customs clearance system, as opposed to the current policy of only allowing select firms to do so.

In a separate press release, the government has stated that it intends to improve logistics, customs service and e-commerce for businesses to fully utilise Korea's Free Trade Agreement (FTA) networks as an export platform to enter Asian markets.

MAS launches further consultation on proposed amendments to Securities and Futures Act

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received to its February 2015 consultation paper on proposed amendments to the Securities and Futures Act (SFA). These responses relate only to the proposed amendments to Part XII of the SFA. The MAS has also launched a further consultation proposing draft legislative amendments necessary to effect the relevant proposals to this part of the SFA, comprising:

- the revision of section 199 of the SFA to clarify that there is no requirement of material price impact to establish a case of false or misleading disclosure;
- the introduction of a statutory definition in section 214 of the SFA of the phrase 'persons who commonly invest' which is found in sections 215 and 216 of the SFA;
- amendments to section 232 of the SFA, in order that the civil penalty imposed may be commensurate with the gravity of misconduct, even in cases where the profit gained or loss avoided happens to be low; and
- priority for the MAS' civil penalty claims over debts by other unsecured creditors that accrue subsequently after contravention.

In addition, the MAS also proposes to amend section 324 of the SFA to make clear that the MAS' officers, who may exercise investigation powers under the Criminal Procedure Code (CPC) in the course of their investigation, would be able to apply for an order under section 324 of the SFA regardless of whether the investigations were being carried out under the SFA or the CPC.

Comments on the consultation paper are due by 23 September 2015.

FINRA publishes regulatory notices announcing SEC approval of research report distribution rules

The Financial Industry Regulatory Authority (FINRA) has published two Regulatory Notices announcing the Securities and Exchange Commission's (SEC's) approval of new FINRA rules governing the publication and distribution of debt and equity research reports.

Regulatory Notice 15-30 announces the SEC's approval of FINRA Rule 2241 (Research Analysts and Research Reports). Rule 2241 addresses conflicts of interest relating to the publication and distribution of equity research reports. According to the Regulatory Notice, Rule 2241 retains the core provision of existing FINRA equity research rules, broadens the obligations on members to identify and mange research-related conflicts of interest, restructures the rules to provide some flexibility in compliance without diminishing investor protection, extends protections where gaps have been identified, expands an exemption for firms with limited investment banking activity, and clarifies the applicability of existing rules.

Regulatory Notice 15-31 announces the SEC's approval of FINRA Rule 2242 (Debt Research Analysts and Debt Research Reports), which addresses conflicts of interest relating to the publication and distribution of debt research reports. The requirements of Rule 2242 are similar to those in Rule 2241 with respect to retail investors.

Unlike Rule 2241, Rule 2242 exempts debt research distributed solely to eligible institutional investors from most

provisions of Rule 2242 regarding supervision, coverage determinations, budget, and compensation determinations; and all of the disclosure requirements applicable to debt research reports distributed to retail investors. FINRA members must obtain the affirmative or negative consents described in Rule 2242 from institutional investors to rely on this exemption.

The provisions of Rule 2241 take effect on either 25 September 2015, or 24 December 2015, as set forth in Regulatory Notice 15-30. Rule 2242 takes effect on 22 February 2016. Rule 2242 permits FINRA members to continue distributing debt research reports to institutional investors without obtaining affirmative or negative consents for up to a year in order to avoid a disruption in their customers' receipt of institutional debt research.

RECENT CLIFFORD CHANCE BRIEFINGS

Britain and the EU – Alternatives to Membership and Prospects for Renegotiation

In light of the upcoming referendum on the UK's membership of the EU, it is important to understand the nature of the UK's current status within the EU, and the alternatives.

This briefing paper provides a critical analysis of the alternatives to EU membership and the prospects of success for the UK's stated negotiating objectives.

http://www.cliffordchance.com/briefings/2015/08/britain_and_the_eu-alternativestomembershi.html

When a Regulator calls (The Use of Information obtained from Compulsory Examinations – Lessons from the Australian experience)

In recent times, regulators have been flexing their muscles by seeking to prosecute those who come before them with the use of information obtained under compulsion. Regulators in Australia have significant powers to compel answers from witnesses such that the cross-examination of those witnesses has been compared to 'pulling wings off a butterfly'.

However, over the last two years, the balance is being redressed by the High Court of Australia as it considers a number of cases challenging the use in criminal trials of evidence compulsorily obtained by regulators. The Court has found that the use of such compulsorily acquired information in subsequent trials is inconsistent with the accusatorial nature of criminal prosecutions in Australia, abrogates the individual's 'right to silence', and is inconsistent with the right to a fair trial.

This briefing paper discusses the Australian approach.

http://www.cliffordchance.com/briefings/2015/08/when_a_regulatorcalls.html

FinCEN Issues New Proposed Rule for Registered Investment Advisers to Implement AML Program and Report Suspicious Activities

The Financial Crimes Enforcement Network (FinCEN) has issued a notice of proposed rulemaking that would require investment advisers that are registered (or required to be registered) with the Securities Exchange Commission (SEC) (i.e., registered investment advisers) to:

- establish an anti-money laundering (AML) program; and
- file suspicious activity reports (SARs).

In addition, the proposed rule would include registered investment advisers in the definition of 'financial institution' under the Bank Secrecy Act that would require investment advisers to, among other things, file Currency Transaction Reports (CTRs) and maintain certain records regarding the transmittal of funds. FinCEN intends to delegate examination authority for ensuring compliance with the proposed rule's requirements to the SEC.

This briefing paper discusses the proposed rule.

http://www.cliffordchance.com/briefings/2015/08/fincen_issues_newproposedruleforregistere.html