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Briefing note

International Regulatory Update

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- Recent Clifford Chance briefings: Contractual recognition of bail-in; Iran Deal and Asia Pacific; and more. Follow this link to the briefings section.

EU and US regulators publish joint statement following regulatory dialogue

Participants in the Financial Markets Regulatory Dialogue (FMRD) between EU and US agencies and regulators have released a joint statement following their meeting on 18 September 2015. The FMRD comprises the EU Commission, European Securities and Markets Authority (ESMA), European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA), the US Treasury, the Federal Insurance Office (FIO), the Federal Reserve, Commodities Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Securities and Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB).

Among other things, the organisations exchanged views on:

- bank structural reforms;
- cross-border resolution of banks and the importance of recovery and resolution frameworks for central counterparties (CCPs);
- cybersecurity in the financial sector;
- the EU Commission proposals for an EU Capital Markets Union (CMU);
- derivatives reforms, including recognition under the European Market Infrastructure Regulation (EMIR);
- funds, including concerns relating to the effect of the Volcker Rule on foreign funds;
- benchmarks reforms;
- insurance; and
- cooperation on audit oversight.

The FMRD will meet next in February 2016.

EMIR: European Securities Committee approves decisions on equivalence of Canada, Mexico, South Africa, South Korea and Switzerland

The European Securities Committee has approved draft EU Commission Implementing Decisions on positive equivalence under Article 25 of the European Market Infrastructure Regulation (EMIR) for Canada, Mexico, South Africa, South Korea and Switzerland. This paves the way for the recognition under EMIR of CCPs incorporated in these jurisdictions.

CRR: Commission Regulations on countercyclical capital buffer, internal ratings based approach and own funds published in Official Journal

The following Regulations under the Capital Requirements Regulation (CRR) have been published in the Official Journal:

- Commission Delegated Regulation (EU) 2015/1555 supplementing Regulation 575/2013 with regard to regulatory technical standards (RTS) for the disclosure of information in relation to the compliance of institutions with the requirement for a countercyclical capital buffer in accordance with Article 440 – enters into force on 9 October 2015 and will apply from 1 January 2016;
- Commission Delegated Regulation (EU) 2015/1556 supplementing Regulation 575/2013 with regard to RTS for the transitional treatment of equity exposures under the internal ratings based (IRB) approach – enters into force on 9 October 2015; and
- a Corrigendum to Commission Implementing Regulation (EU) 2015/880 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in Regulations 575/2013 and 648/2012.

CRR: EBA consults on draft guidelines to harmonise definition of default

The European Banking Authority (EBA) has launched a consultation on draft guidelines for the harmonisation of the definition of default. The draft guidelines have been prepared under Article 178(7) of the CRR and specify all aspects related with the application of default of an obligor.

The draft guidelines are intended to harmonise the definition of default across the EU prudential framework, in order to enhance the consistency with which EU banks apply regulatory requirements to their capital positions and ensure a consistent use of the definition. The harmonised approach is also intended to increase comparability of own funds requirements and reduce the variability of the risk estimates under the Internal Ratings-Based (IRB) approach.

The consultation paper also sets out proposals in relation to the process for implementing the guidelines, which the EBA suggests should include a phase-in period.

Comments on the consultation are due by 22 January 2016.

ECB publishes Eurosystem oversight policy framework for payment systems

The European Central Bank (ECB) has published an updated framework for Eurosystem oversight of euro area payment systems. The paper is intended to strengthen the transparency of the Eurosystem's oversight policies and replaces the previous policy statement on the role of the Eurosystem in the field of payment systems oversight, which was published in 2000. The framework sets out the scope of the Eurosystem's oversight and its activities, including the existing set of tools and instruments that the Eurosystem employs.

UCITS V: ESMA publishes draft ITS on penalties and measures imposed by NCAs

The European Securities and Markets Authority (ESMA) has delivered its draft implementing technical standards (ITS) on penalties and measures under Article 99e of the Directive on undertakings for transferable securities (UCITS V) to the EU Commission for endorsement.

Under UCITS V, national competent authorities (NCAs) are required to:

- provide ESMA annually with aggregated information on the penalties and measures imposed in respect of infringements under UCITS; and
- report to ESMA when they make public any administrative penalties or measures at the time of publication.

The draft standards set out the procedures and forms NCAs must use when submitting the information to ESMA.

There was no public consultation on these draft standards as ESMA concluded that it would have been disproportionate in relation to their scope and impact, as the addressees of the ITS will only be NCAs and not market participants.

The ITS will enter into force on the twentieth day following their publication in the Official Journal, and are expected to apply from 18 March 2016.

ESMA Chair delivers keynote speech on OTC derivatives union

Steven Maijoor, Chair of ESMA, has delivered a keynote speech entitled 'Clearing the way towards an OTC derivatives union' at the 2015 ISDA Annual Europe Conference. The speech underlined that while the legislative phase of post-crisis financial reform nears completion, important challenges remain in relation to implementation. Mr. Maijoor compared the work that ESMA has done on derivatives regulation to current efforts towards creating a Capital Markets Union, noting that ESMA was already close to establishing what could be called an 'OTC derivatives union', which had created a high level of consistency across the EU in areas such as reporting requirements.

He then highlighted the initiatives under EMIR that are currently under way, including on:

- access to clearing and clearing obligations – ESMA has assessed interest rate swaps as a priority and the draft regulatory standards it submitted to the Commission could enter into force around the end of 2015; and
- reporting requirements – Mr. Maijoor noted that, while trade repositories have gathered data that has informed ESMA's work on the clearing obligation under EMIR, transparency requirements under MiFIR, and the analysis of the systemic relevance of non-financial counterparties (NFCs), there are a number of shortcomings and limitations that need to be addressed so that EMIR reports better fulfil their objective.

Mr. Maijoor also discussed the EMIR review and the four reports that ESMA submitted in response to the Commission consultation. The reports covered:

- the definition of NFCs and the application of hedging criteria in the calculation of thresholds;
- the options adopted by CCPs to cope with pro-cyclicality;
- arrangements to secure client collateral, particularly relating to segregation and portability; and
- the challenges that ESMA has encountered in implementing EMIR.

Mr. Maijoor concluded by discussing ESMA's paper of 27 August 2015 on margin periods of risk (MPOR), which looks at the differences between CCPs in the EU and US.

ISDA launches new industry initiative for derivatives identification standard

The International Swaps and Derivatives Association (ISDA) has announced the launch of a new industry initiative for a derivatives product identification standard.

The initiative, which has been launched in response to MiFID 2 and the US Securities and Exchange Commission's reporting rules, aims to encourage an open-source standard derivatives product identification system

that can be applied across all derivatives facilities, including trading venues, clearing houses, repositories and other infrastructures.

ISDA is working with a number of buy- and sell-side market participants, vendors, platforms and trade associations on this project.

FSB reports to G20 on corporate funding structures, Data Gaps Initiative and foreign currency exposures

The Financial Stability Board (FSB) has published the following three reports that were sent to G20 Finance Ministers and Central Bank Governors ahead of their meeting in Ankara on 4-5 September 2015 and highlighted where the Ministers and Governors responded in their communiqué following the meeting:

- a report on corporate funding structures and incentives, which was prepared in association with the International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), Bank for International Settlements (BIS), International Organization of Securities Commissions (IOSCO) and the World Bank Group, and analyses factors related to the liability structure of corporates, in particular nonfinancial corporate debt. In their communiqué, G20 Ministers and Governors have requested that the FSB continue to explore risks and policy options in relation to liability structures;
- the sixth annual progress report on the implementation of the G20 Data Gaps Initiative (DGI), highlighting progress made and setting out a second phase of the initiative to strengthen and consolidate work undertaken to date and promote high quality statistics for policy use, the proposal for which was endorsed by G20 Ministers and Governors; and
- a report on work in relation to data gaps for foreign currency exposures, carried out jointly with the IMF and BIS, which is intended to improve assessments of cross border risk. The G20 Ministers and Governors have requested that this work be taken forward through the second phase of the DGI.

FSB, Basel Committee, CPMI and IOSCO publish progress report on CCP workplan

The FSB, the Basel Committee on Banking Supervision (BCBS), the Committee on Payments and Markets Infrastructures (CPMI) and IOSCO have published a progress report on their work to enhance the resilience, recovery planning and resolvability of central counterparties (CCPs). The report provides an update on the progress of the 2015 workplan developed by these bodies to make CCPs more resilient.

BoE publishes article on UK mechanism for bail-in

The Bank of England (BoE) has published its quarterly bulletin for Q3 2015. Among other things, the bulletin includes an article on bank failure and bail-in, which describes the background and key features of bail-in, how it works and other elements that need to be in place for bail-in to be successful, including an appropriate legal framework and sufficient capacity in firms' liabilities to absorb losses and be recapitalised. An appendix sets out the steps that the BoE currently envisages for the UK mechanism for carrying out a bail-in.

The article also considers:

- contingent capital instruments (CoCos);
- firms' shareholder and creditor property rights;
- risks of contagion in the wider financial system; and
- whether bail-in solves 'too big to fail'.

In addition to the article on bail-in, the quarterly bulletin includes feature articles on topics that include the insurance sector and financial stability, the concentration of risk within central counterparties (CCPs) in OTC derivatives markets and the BoE's expectations on the future of cash.

Ministerial Order on prudential regime applicable to branches of credit institutions established in France and registered in a non-Member State published

A Ministerial Order, dated 11 September 2015, determining the prudential regime applicable to branches of credit institutions established in France, but whose head office and place of registration is located in a state which is neither part of the European Union, nor of the European Economic Area, has been published. The Order provides that these branches have to comply with provisions applicable to credit institutions, pursuant to the CRR.

The scope of this Order includes branches of credit institutions mentioned in Article L. 511-10, I, of the French Financial and Monetary Code (Code monétaire et financier).

The order will enter into force on 1 July 2016, except for the two first lines of Article 3 and Articles 7, 9, 11 to 13, which entered into force on 20 September 2015.

Recovery and resolution: Decree and two Ministerial Orders implementing BRRD and DGSD2 in France published

On 21 August 2015, an Ordinance implementing the Bank Recovery and Resolution Directive (BRRD) and the recast Deposit Guarantee Schemes Directive (DGSD2) was published. The Ordinance is intended to implement the new EU Regulation on the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF) in French law (in the Monetary and Financial Code (Code monétaire et financier)).

Three further regulations have now been issued for the purpose of implementing the BRRD:

- a Decree, dated 17 September 2015 and published on 20 September;
- an Order, dated 11 September 2015, which implements Annex C of the Directive and sets out the assessment criteria which should be taken into account by the resolution college of the ACPR; and
- an Order, dated 11 September 2015, which implements Articles 105 and 107 of the Directive and provides for the conditions of intervention by the French Deposit and Resolution Guarantee Fund (Fonds de garantie des dépôts et de résolution) where a resolution procedure is commenced – specific provisions have been included related to the treatment of banking groups established or organised in different EU jurisdictions.

These provisions entered into force the day following their publication.

MAS consults on proposed amendments to Securities and Futures Act, Financial Advisers Act and Trust Companies Act

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed amendments to the Securities and Futures Act (SFA), the Financial Advisers Act (FAA), and the Trust Companies Act (TCA).

The consultation follows the MAS' review of the SFA, FAA and TCA and their subsidiary legislation (collectively referred to as 'relevant laws'), to identify various areas where its supervisory powers should be further enhanced and where the business conduct requirements for regulated persons should be strengthened. In line with the ongoing review of the Banking Act, the proposed enhancements will also harmonise similar requirements across the various Acts where appropriate.

The proposed changes are intended to:

- rationalise existing requirements applicable to the various financial institutions regulated under the SFA, FAA and TCA;
- ensure that the MAS is kept apprised of specified adverse developments in financial institutions regulated under the SFA, FAA and TCA;
- provide for suitable powers of regulatory oversight; and
- align requirements for financial institutions regulated under the SFA, FAA and TCA with those applicable to banks where appropriate.

In addition, the MAS proposes to provide an option for investors to more conveniently pledge securities held in their CDP direct accounts to their brokers. This would facilitate investors using these securities to meet collateral requirements. To promote financial prudence, securities brokers will be required to collect a minimum of 5% of collateral from their customers for trading of listed securities.

The proposed legislative amendments to the SFA, FAA and TCA and their relevant subsidiary legislation are set out in Annexes 1 to 13 of the consultation paper.

Comments on the consultation paper are due by 16 October 2015.

MAS responds to feedback received on proposals to enhance regulatory safeguards for investors in capital markets

The MAS has published its responses to the feedback it received on its July 2014 consultation on proposed enhancements to regulatory safeguards for investors in the capital markets. The MAS will proceed with enhancements to its regulatory framework for safeguarding investors' interests. The key changes are as follows:

- retail investors in non-conventional investment products (that share features similar to capital markets products, such as precious metals buy-back arrangements and collectively-managed investment schemes) will be accorded the same regulatory safeguards as investors in capital markets products; and
- investors who meet prescribed wealth or income thresholds who qualify as accredited investors (AIs) will have the option to benefit from the full range of regulatory safeguards that are applicable to retail investors.

Under the current regulatory regime, investors who meet prescribed wealth or income thresholds are classified as

AIs by default. They are accorded a lower level of regulatory protection as they are considered to be better able to protect their own interests.

The MAS has announced that it will refine the regulatory regime to empower AI-eligible investors to choose the level of regulatory safeguards best suited to their individual circumstances:

- financial institutions (FIs) will have to treat new customers who are AI-eligible as retail investors by default, unless the customers choose to 'opt-in' to AI status; and
- FIs can continue to treat existing customers who are AI-eligible as AIs, unless the customers choose to 'opt-out' of AI status to benefit from the full range of capital markets regulatory safeguards available to retail investors.

Amendments to the Securities and Futures Act (SFA) to implement the changes will be tabled in Parliament in 2016.

The MAS is still reviewing feedback on the remaining proposal to introduce a complexity-risk ratings framework for investment products and will issue a separate public response later.

Indonesian Supreme Court rules on contractual language requirement

The Indonesian Supreme Court has announced that it has rejected an appeal filed by Nine AM Ltd in connection with the annulment of Nine AM Ltd's loan agreement with an Indonesian borrower under an Indonesian law governed loan agreement.

Details of the ruling have not been made available, but the announcement indicates that the previous judgments handed down by the West Jakarta District Court, and subsequently by the Jakarta High Court, have been upheld by the Supreme Court, thus confirming the requirement to use the Indonesian language in contracts involving Indonesian parties, at least where the conditions are identical to the loan agreement examined by the courts.

CFTC proposes to amend definition of 'material terms' for purposes of swap portfolio reconciliation

The Commodity Futures Trading Commission (CFTC) has proposed to amend its definition of 'material terms' for purposes of swap portfolio reconciliation under CFTC regulation 23.502. The proposed change would specifically exclude the following data fields:

- an indication that the swap will be allocated;
- if the swap will be allocated, or is a post-allocation swap, the legal entity identifier of the agent;
- an indication that the swap is a post-allocation swap;
- if the swap is a post-allocation swap, the unique swap identifier;
- block trade indicator;
- with respect to a cleared swap, the execution timestamp;
- with respect to a cleared swap, the timestamp for submission to SDR;
- clearing indicator; and
- clearing venue.

Allocation occurs when a counterparty designates portions of a swap among multiple third parties for which it is acting as an agent. Any discrepancies in these data fields would not need to be resolved during swap portfolio reconciliation.

The proposed amendment, if adopted, would supersede CFTC Staff Letter 13-31, issued on 26 June 2013. The comment period for the proposed amendment will end 60 days after its publication in the Federal Register, which is expected shortly.

RECENT CLIFFORD CHANCE BRIEFINGS

English judiciary establishes a specialist court for the financial markets

Conscious of the international competition for contentious business, the High Court in England is setting up a specialist Financial List, in which disputes will be determined by judges with expertise in the financial markets. The Financial List will also offer the possibility of deciding test cases of importance to the financial markets even though there is no live dispute. The English courts are also setting up a Shorter and Flexible Trials Pilot Scheme to see if litigation procedures can be abbreviated so as better to meet the parties' needs.

This briefing paper discusses the establishment of the Financial List and the Shorter and Flexible Trials Pilot Scheme.

http://www.cliffordchance.com/briefings/2015/09/english_judiciaryestablishesaspecialistcour.html

Article 55 of the BRRD: contractual recognition of bail-in – what you need to do

Article 55 of the BRRD requires EU firms and other in-scope entities to include a contractual recognition of bail-in

clause in a very wide range of non-EU law governed contracts. EU Member States are required to implement Article 55 into national law by 1 January 2016 and some states have already done so.

This briefing paper looks at the scope of Article 55 and sets out some practical steps to assist you with preparing for compliance.

http://www.cliffordchance.com/briefings/2015/09/article_55_of_thebrrdcontractualrecognitio.html

Reform of the Treatment of Pledges of Future Credits in Insolvencies

The Spanish legislator is looking to take advantage of the new Public Sector Legal Regime Act to reform the heavily criticised Article 90.1.6º of the Insolvency Act, on the pledge of credit rights. This reform would entail conferring a special privilege on pledges of credit rights, provided that the legal relationship from which the credits arise exists at the moment the pledge is created, albeit without the need for registration. The authorisation of the government will also be required in order to pledge credits derived from a concession contract, such as the RPA.

This briefing paper discusses the planned reform.

http://www.cliffordchance.com/briefings/2015/09/reform_of_the_treatmentofpledgeoffutur.html

Thailand – Business Collateral Act

On 7 August 2015, the National Legislative Assembly (NLA) approved the Business Collateral Act as proposed by the National Council for Peace and Order.

This briefing paper summarises the provisions of the Act which, once implemented, would address certain obstacles under the Civil and Commercial Code (CCC) that currently prevent the taking of security. The Act would make the taking of security in Thailand more practical and covers a broader range of assets that could be used as security.

http://www.cliffordchance.com/briefings/2015/09/thailand_businesscollateralact.html

Foreign investment regulation in Australia

Foreign investment in Australia is governed by a complex combination of law and policy. Inbound investments by foreign persons in Australian businesses and assets over stipulated thresholds will be reviewed on a case-by-case basis to determine whether the transaction is contrary to the national interest. Foreign investment in most land assets and by foreign government investors will be subject to notification and review, irrespective of the value of the investment. Australia's foreign investment regime is currently undergoing significant reforms, which are expected to be in force by 1 December 2015.

This briefing paper explains the key elements of the current regime and outlines developments, issues and changes which are expected to come into force by year's end.

http://www.cliffordchance.com/briefings/2015/09/foreign_investmentregulationinaustralia.html