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Briefing note

International Regulatory Update

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- FRB proposes rule to require large banking organizations to publicly report liquidity measures on a quarterly basis
- FRB announces implementation of several recommendations to enhance supervision of large and complex banking organizations
- FRB adopts rule to limit emergency lending powers
- Recent Clifford Chance briefings: PD3; Recognition of EU bail-in clauses; and more. Follow this link to the briefings section.

Prospectuses: EU Commission proposes new rules

The EU Commission has published a proposal for a Regulation on the prospectus to be published when securities are offered to the public or admitted to trading. The proposed Prospectus Regulation revises the current Prospectus Directive in order to enable investors to make more informed investment decisions, simplify the rules for companies that wish to issue shares or debt, and foster cross-border investments in the Single Market.

The proposed changes to the prospectus rules include:

- exempting the smallest capital raisings, with the introduction of a higher threshold to determine when companies must issue a prospectus – no EU prospectus will be required for capital raisings below EUR 500,000 (up from EUR 100,000) and Member States will also be able to set higher thresholds for their domestic markets;
- creating a lighter prospectus for smaller companies to allow SMEs to produce prospectuses without incurring costs that are not proportionate to the size of the fundraising or the benefits to investors – the threshold for SMEs who can take advantage of this will be doubled from EUR 100 million market capitalisation to EUR 200 million;
- measures to support shorter and clearer prospectuses and providing more clarity on the amount of information that is needed;
- a simplified prospectus for companies already listed on a public market that want to issue additional shares or raise debt to provide more flexibility for those companies that wish to tap into capital markets more than once – currently, 70% of prospectuses approved annually are secondary issuances for firms already listed on a public market;
- a fast track and simplified frequent issuer regime, with the introduction of an annual 'Universal Registration Document' (URD) containing all the necessary information on a company that wants to list shares or issue debt on a frequent basis – issuers who regularly maintain an updated URD with their supervisors will benefit from a 5 day fast-track approval when they actually want to tap into capital markets by issuing shares, bonds or derivatives; and
- a single access point for all EU prospectuses – the European Securities and Markets Authority (ESMA) will provide free and searchable online access to all prospectuses approved in the European Economic Area.

The proposed Regulation has been passed to the EU Parliament and the Council of Ministers for discussion and adoption.

The Commission has also adopted a Delegated Regulation under the Prospectus Directive on approval and publication of the prospectus and dissemination of advertisements.

EMIR: Delegated Regulation on clearing obligation for G4 rates published in Official Journal

EU Commission Delegated Regulation (EU) 2015/2205 supplementing the European Market Infrastructure Regulation (EMIR) with regard to regulatory technical standards (RTS) on the clearing obligation for interest rate swaps (IRS) in the G4 currencies has been published in the Official Journal.

The Delegated Regulation will enter into force on 21 December 2015.

CRR: EU Commission Implementing Regulation on closely correlated currencies published in Official Journal

EU Commission Implementing Regulation (EU) 2015/2197 laying down implementing technical standards (ITS) with regard to closely correlated currencies in accordance with the Capital Requirements Regulation (CRR) has been published in the Official Journal. The Regulation identifies a list of currencies for the purposes of calculating the capital requirements for foreign exchange risk according to standardised rules. The list of closely correlated currencies will be updated yearly by the European Banking Authority (EBA).

The Regulation will enter into force on 17 December 2015.

Securitisation: EU Council agrees negotiating stance

The Permanent Representatives Committee (COREPER) has approved, on behalf of the EU Council, a negotiating stance on the proposed regulation on creating a European framework for simple, transparent and standardised securitisation and the proposed regulation amending the CRR as regards the capital treatment of securitisations.

The agreement will be confirmed by the EU Council on 8 December 2015 and enables the incoming Dutch Presidency to begin talks with the EU Parliament in early 2016.

FTT: EU Council Presidency sets out state of play

The EU Council Presidency has published a document setting out the state of play on the proposal for an enhanced cooperation Directive implementing a financial transaction tax (FTT) across 11 Member States. Among other things, the Council has not yet resolved issues relating to whether the tax should be imposed on an issuance or residence basis and whether the FTT should operate on a gross or net basis. The document also highlights ongoing discussion in relation to a possible market-maker exemption and the scope of the FTT as applied to derivatives as well as other issues related to open questions that constitute the 'building blocks' of the design of the future FTT that will require further discussion, in particular relating to exemptions for pension funds and the real economy.

Banking Union: intergovernmental agreement establishing Single Resolution Fund ratified

The intergovernmental agreement (IGA) on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF) under the Single Resolution Mechanism (SRM) has been ratified by enough Member States before the midnight deadline on 30 November 2015 to enable full resolution powers to be granted to the Single Resolution Board (SRB) on 1 January 2016.

The EU Council decided in December 2013 to use an IGA to establish the rules on transferring funds to the SRF to provide maximum legal certainty. Under the IGA funds will be built up over eight years to reach a target level of at least 1% of the amount of covered deposits of all credit institutions authorised in all the participating Member States. The IGA will enter into force on the first day of the second month following the date when instruments have been deposited by signatories participating in the Banking Union representing at least 90% of the aggregate of the weighted votes of all participating Member States and as at 30 November 93% of weighted Council votes of all participating Member States have deposited their instrument of ratification with the EU Council.

The IGA will enter into force on 1 January 2016.

CRR: EBA assesses banks' transparency in 2014 Pillar 3 reports

The European Banking Authority (EBA) has published an assessment of banks' Pillar 3 reports, which assesses 17 sample institutions' disclosure in their 2014 annual Pillar 3 reports against the disclosure requirements in part eight of the CRR.

The assessment, the first carried out since the entry into force of the CRR on 1 January 2014, focuses on areas where the CRR has introduced changes compared with the previous requirements under the Banking Consolidation Directive (2006/48/EC) in relation to:

- risk management;
- own funds;
- capital requirements;
- indicators of global systemic importance;
- unencumbered assets;
- market risk;
- remuneration policy; and
- the use of the Internal Ratings-Based (IRB) approach to credit risk.

Among its findings, the EBA has observed improvements in the provision of clear disclosure indices and the presentation of information on risk model parameters in a tabular format and disclosures on the assessment of globally systemically important institution (G-SII) status, remuneration and asset encumbrance although further improvements could be made. The EBA believes disclosures on IRB models could be enhanced for the breakdown of IRB risk parameters by exposures and geography.

The report also compares the revised Basel Pillar 3 requirements issued by the Basel Committee on Banking Supervision (BCBS) in January 2015 with current CRR requirements and assesses the extent of the changes introduced by BCBS.

MiFID2: ESMA publishes final report on complex debt instruments and structured deposits

The European Securities and Markets Authority (ESMA) has published its final report on guidelines for complex debt

instruments and structured deposits under MiFID2. The guidelines are intended to promote greater convergence in the classification of complex or non-complex financial instruments or structured deposits for the purposes of Article 25(4) MiFID2, under which investment firms may provide investment services in certain circumstances that only consist of execution or reception and transmission of orders without obtaining client information necessary to assess the appropriateness of the service or product for the client.

The guidelines specify criteria for the assessment of:

- debt instruments incorporating a structure which makes it difficult for the client to understand the risk involved; and
- structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term.

The guidelines also clarify the concept of 'embedded derivatives' in order to provide an overall framework for the application of Article 25(4)(a) of MiFID2 in relation to debt instruments.

The guidelines will be translated into the official EU languages and published on the ESMA website.

The publication of the translations will trigger a two-month period during which national competent authorities (NCAs) must notify ESMA whether they comply or intend to comply with the guidelines.

The guidelines will apply from 3 January 2017.

AIFMD: ESMA updates Q&A

ESMA has published updates to its questions and answers (Q&As) on the Alternative Investment Fund Managers Directive (AIFMD). This update includes new answers relating to reporting to national competent authorities.

The Q&A document is intended to promote common supervisory practices in the application of the AIFMD and is aimed at competent authorities under the Directive. Answers are also intended to help alternative investment fund managers (AIFMs) by clarifying certain aspects of the rules.

BoE publishes Financial Stability Report and results of 2015 stress test

The Financial Policy Committee (FPC) of the Bank of England (BoE) has published its Financial Stability Report (FSR), which is prepared biannually and sets out the FPC's assessment of the outlook for financial stability in the UK, identifies risks to the financial system and its resilience to those risks. Alongside the FSR, the BoE has also published the results of the 2015 stress test of seven UK banks and the results of its systemic risk survey for the second half (H2) of 2015, which was conducted between 7 September and 25 September 2015.

The FSR identifies risks facing the UK financial system from emerging market economies, strengthened buy-to-let and commercial real estate activity, high levels of household indebtedness and the UK current account deficit, as well as cyber risk. The FPC assesses that the UK banking sector has become more resilient in line with regulatory requirements with an aggregate Tier 1 capital position of major UK banks of 13% of risk-weighted assets in September 2015.

The resilience of the UK banking sector to deterioration in global financial market conditions and the macroeconomic environment, including in emerging market economies, has been assessed in the 2015 annual stress test, results from which have been published alongside the FSR. Performance in the stress was assessed against two metrics of capital adequacy:

- a common equity Tier 1 (CET1) capital ratio of 4.5% of risk-weighted assets; and
- a leverage ratio set at 3% of the Leverage Exposure Measure, to be met with Tier 1 capital.

Projections of capital adequacy in the scenario have been derived from banks' own models, in-house models, sectoral analysis and peer comparison. The bank-specific results have been approved by the Prudential Regulation Authority (PRA) Board.

Overall, the BoE has found that banks continue to strengthen their capital positions and the 2015 results indicate that banks would be more resilient in the face of the macroeconomic stress scenario than in 2014. Of the seven participating banks, the PRA Board judged that one did not meet its individual capital guidance after management actions in the scenario and another bank did not meet its Tier 1 minimum capital requirement of 6% after management actions in the scenario. However, the FPC judged that no macroprudential actions on bank capital were required in response to the 2015 test.

In October 2015 the BoE published its approach to stress testing until 2018. For 2016, the BoE intends to run its annual cyclical scenario, to coincide with the European Banking Authority's (EBA's) stress test, and in 2017, the

BoE intends to run both its annual cyclical scenario and, for the first time, a biennial exploratory scenario, which will assess emerging or latent threats to financial stability.

The FPC has also published a paper which finalises the FPC's view on the overall calibration of the capital framework for the UK banking system, in relation to both:

- going concern elements, which relate to loss-absorbing resources intended to mitigate the impact of losses in times of stress, ensure a bank can keep operating and maintain credit to the economy; and
- gone concern elements, which relate to loss-absorbing resources that can be bailed in when a bank has failed.

The paper describes:

- how the framework of capital requirements is expected to evolve by 2019 as well as ongoing work to refine requirements during the transition period, including the FPC's intention to operate a countercyclical capital buffer that will be applied to banks' UK exposures; and
- how the UK banking system framework compares to capital frameworks in other jurisdictions.

Among other things, the paper discusses some aspects of resolution including total loss-absorbing capacity (TLAC) and minimum own funds and eligible liabilities (MREL), which the BoE has announced its intention to consult on in December 2015.

CSDR: HM Treasury publishes response to call for evidence on recognised clearing houses

HM Treasury has published its response to the March 2015 call for evidence on recognised clearing houses. The Treasury sought views on how best to amend legislation applying to central securities depositories (CSDs) in the UK, as part of the domestic implementation process for the Central Securities Depositories Regulation (CSDR). Amongst other things, the Treasury questioned whether central securities depositories subject to CSDR authorisation requirements should continue to be regarded as clearing houses.

In light of the responses it received, HM Treasury will further consider the activities of Model B clearers (i.e. clearing agents that take on the trading and related settlement liabilities of their clients) and risk management companies providing margining and netting solutions and take forward the suggestion of a new Recognised Bodies (RB) status for CSDs (an RCSD) in the forthcoming consultation on implementing CSDR domestically.

FCA consults on changes to compensation sourcebook

The Financial Conduct Authority (FCA) has published a consultation paper (CP15/40) on proposed changes to some of the rules in its Compensation sourcebook (COMP) that govern the operation of the Financial Services Compensation Scheme (FSCS).

The consultation proposes:

- an increase in the non-investment (general and pure protection) insurance mediation compensation limit in relation to some types of insurance from 90% to 100%;
- changes to the eligibility of occupational pension schemes trustees to claim on the FSCS; and
- changes to make express reference to how the compensation rules apply where a successor firm is in default or to assist the FSCS in handling claims.

Comments on the consultation are due by 29 February 2016.

PSR consults on Interchange Fees Regulation

The Payment Systems Regulator (PSR) has launched a consultation on its approach to monitoring compliance with the Interchange Fee Regulation (2015/751 – IFR, also referred to as the MIF Regulation). HM Treasury confirmed the Government's decision to designate the PSR as the overarching authority that is empowered to supervise and enforce compliance with the IFR on 17 November 2015.

The consultation paper sets out the PSR's draft guidance on IFR provisions that will apply from 9 December 2015, including:

- interchange fee caps and how the PSR will consider exemptions;
- the PSR's approach to monitoring compliance with the IFR;
- powers and procedures under the IFR; and
- penalties under the IFR.

The consultation paper forms the first phase in the PSR's consultation on the IFR and the PSR intends to consult on its approach to the remaining IFR provisions, which come into effect on 9 June 2016, in due course.

Comments on the consultation are due by 29 January 2015.

Bank of Spain consults on draft circular to entities and branches participating in Deposit Guarantee Fund of Credit Institutions on balances that form calculation basis for contributions

The Bank of Spain has launched a public consultation process on its draft circular addressed to entities and branches participating in the Deposit Guarantee Fund of Credit Institutions (Fondo de Garantía de Depósitos de Entidades de Crédito) on balances that form the calculation basis for all contributions to the fund.

The draft circular will replace Circular 4/2001 of the Bank of Spain in order to include modifications of: (i) Law 11/2015, of 18 June, on recovery and resolution of credit institutions and investment companies; (ii) Royal Decree 1012/2015, of 6 November, on deposit guarantee funds of credit institutions; and (iii) Circular 5/2014, of 28 November, on the Risk Information Centre.

The draft circular includes the following obligations:

- credit institutions and branches participating in the Deposit Guarantee Fund shall submit to the Bank of Spain a quarterly statement on the calculation basis for the contributions to the Deposit Guarantee Fund. The template for these statements is included as Annex 1 to the draft Circular. The Bank of Spain will send this quarterly information to the Deposit Guarantee Fund;
- in order to calculate the basis, deposits shall be calculated by their nominal value plus interest accrued until the date the information is calculated and securities and financial guarantee instruments shall be calculated by their fair value as at the date the information is calculated, but, where fair value cannot be calculated, a nominal value or refund amount criteria will apply; and
- credit institutions and branches participating in the Deposit Guarantee Fund shall make available to the Bank of Spain at all times information on deposits received.

The consultation ends on 7 December 2015.

EMIR: CSSF issues practical guidance on intragroup exemptions from clearing

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued practical guidance on how to make notifications/applications for intragroup exemptions from the clearing obligations under the European Markets Infrastructure Regulation (EMIR).

The CSSF's Newsletter No. 178 for November 2015 provides information on the first Commission Delegated Regulation (EU) 2015/2205 with regard to regulatory technical standards (RTS) on the clearing obligations for certain interest rate swaps that will enter into force on 21 December 2015.

Financial counterparties established in Luxembourg and where the CSSF is the competent authority, and non-financial counterparties established in Luxembourg, as defined in article 4(2) of EMIR, can make use of the exemptions from the clearing obligations for intragroup transactions in OTC derivatives contracts. These counterparties have to notify or apply to the CSSF no less than 30 calendar days before the intended use of the exemption.

The CSSF has announced that interactive forms will be published on its website once the RTS enter into force, permitting the submission of such notifications/applications for intragroup exemptions to the CSSF. The CSSF Newsletter provides a link to preview this form now, to enable counterparties to gather the relevant information.

The CSSF Newsletter further indicates e-mail addresses to which written notices will have to be sent if changes to the information submitted in the notification/application occur after exemption.

CSSF clarifies upcoming changes to Luxembourg transparency rules

The CSSF has issued a press release providing clarifications in relation to the provisions of the Transparency Directive Amending Directive (2013/50/EU). This Directive introduces amendments to the Transparency Directive (2004/109/EC) and had to be implemented into national law by 26 November 2015.

In anticipation of transposition in Luxembourg, the CSSF has drawn the attention of issuers of securities for which Luxembourg is the home Member State, as well as shareholders who fall under the provisions of the Luxembourg Transparency Directive implementing law, to certain points relating to the publication of regulated information, the determination of the home Member State, and notifications of major holdings.

Under Directive 2013/50/EU issuers are no longer required to (a) publish quarterly financial information, (b) make public new loan issues and in particular any guarantee or security in respect thereof, or (c) communicate to the CSSF any amendments to the instrument of incorporation or

statutes of the issuers. The CSSF will not take measures against issuers which do not fulfil their publication or communication obligations falling under (a) for a period ending on or after 30 September 2015, under (b) in relation to loans issued after 26 November 2015 and under (c) for amendments foreseen after 26 November 2015.

The CSSF has further invited issuers who can choose their home Member State and who have not already done so, to publish their choice and to inform the concerned authorities within the required three-month period starting from 27 November 2015.

Finally, with regard to the notification of major holdings, the CSSF has invited and encouraged the persons subject to the notification requirements to refer to the new provisions from 27 November 2015 onwards when making notifications.

The CSSF also accepts the new ESMA standard forms for such notifications of choice of home Member State or major holdings.

Swiss National Bank announces commencement of renminbi clearing in Switzerland

The Swiss National Bank (SNB) has announced that the Zurich branch of China Construction Bank has been authorised by the People's Bank of China (PBC) to act as clearing bank for renminbi in Switzerland.

With this authorisation, the Memorandum of Understanding between the SNB and the PBC on the establishment of renminbi clearing arrangements in Switzerland, signed in January 2015, has been successfully implemented.

According to the SNB, the availability of renminbi clearing services will facilitate and promote the use of the renminbi in cross-border transactions between companies and financial institutions. Furthermore, the development of a renminbi market in Switzerland is intended to contribute to the strength of Switzerland as a financial centre.

APRA proposes revisions to prudential framework for securitisation

The Australian Prudential Regulation Authority (APRA) has released a discussion paper on its proposal to revise the prudential framework for securitisation for authorised deposit-taking institutions (ADIs) and a draft of the proposed revised Prudential Standard APS 120 Securitisation (APS 120).

APRA has indicated that its objective in revising the prudential requirement for securitisation is primarily to simplify the framework currently in place, while taking into account reform initiatives that are taking place globally.

The main proposals relating to simplification in APRA's words include:

- the explicit recognition of funding-only securitisation;
- well defined thresholds for capital relief securitisation, which better articulate the requirements to be met for regulatory capital relief; and
- streamlining the approaches to determining regulatory capital requirements for ADIs' securitisation exposures and harmonising them for ADIs using standardised or internally-modelled risk weights.

APRA has invited written submissions on the proposals by 1 March 2016, with the intention of releasing a draft prudential practice guide and reporting standards and reporting forms for consultation in the first half of 2016. The final prudential standard, prudential practice guide, reporting standards and reporting forms will be released in the second half of 2016 and are expected to take effect on 1 January 2018.

HKMA issues new guideline on minimum criteria for authorisation

The Hong Kong Monetary Authority (HKMA) has issued a new guideline on minimum criteria for authorisation, superseding the previous version it issued on 4 October 2013.

The guideline sets out the manner in which the HKMA will interpret the licensing criteria set out in the Seventh Schedule to the Banking Ordinance and exercise the functions conferred by it.

Under section 16(1) of the Banking Ordinance the HKMA has a general discretion to grant or refuse an application for authorisation. Under section 16(2), the HKMA is required to refuse authorisation if any one or more of the criteria specified in the Seventh Schedule are not fulfilled with respect to the applicant.

HKMA issues new guideline on approval and revocation of approval of money brokers

The HKMA has issued a new guideline on the approval and revocation of approval of money brokers, superseding the previous version it issued on 9 May 1997.

The guideline describes the authorisation regime for money brokers and explains how the HKMA will interpret the minimum criteria for the approval of money brokers as set out in the Eleventh Schedule to the Banking Ordinance and

the grounds for the revocation of approval of money brokers as set out in the Twelfth Schedule to the Banking Ordinance.

HKMA proposes to implement BCBS-IOSCO margin requirements and IOSCO's risk mitigation standards

The HKMA has launched a consultation on its proposal to implement the Basel Committee on Banking Supervision (BCBS)-International Organization of Securities Commissions (IOSCO) margin requirements and IOSCO's risk mitigation standards for non-centrally cleared over-the-counter (OTC) derivatives in Hong Kong, with effect from 1 September 2016.

The HKMA has been participating in discussions in the BCBS-IOSCO Working Group on Margining Requirements, and has taken other jurisdictions' implementation approaches into consideration in developing its proposals and the provisions set out in the draft Supervisory Policy Manual (SPM) module attached to the consultation paper.

Comments on the consultation are due by 15 January 2016.

Korean government announces plans to expand financial cooperation with China

The Korean Government has announced its decision to pursue the expansion of Korea-China financial cooperation as it intends to adhere to the financial agreements between the two countries.

In particular, the government intends to:

- shift Won-Yuan exchange rates from arbitrated rates to Won-Yuan direct trading market rates;
- lower Won-Yuan transaction costs;
- build a Won-Yuan real time settlement system between the Bank of Korea and China's Bank of Communications;
- issue RMB-denominated sovereign bonds in the Chinese Interbank bond market;
- open a Won-Yuan direct trading market in the Chinese FX market and commence further discussion with the Chinese Government in the first half of 2016 to arrange details; and
- help Korean financial institutions with Yuan capital investment.

FRB proposes rule to require large banking organizations to publicly report liquidity measures on a quarterly basis

The Federal Reserve Board (FRB) has proposed a rule that would implement public disclosure requirements regarding the liquidity coverage ratio (LCR) of large banking organizations. LCR is the ratio of an organization's high-quality liquid assets (HQLA) to its net cash outflow.

The proposed rule would apply to all depository institution holding companies and covered nonbank companies that are required to calculate LCR (covered companies) under 12 CFR part 249. The proposed rule would require covered companies to publicly disclose several measures of their liquidity profile on a quarterly basis in a standardized tabular format, including the following:

- consolidated LCRs;
- consolidated HQLA amounts, broken down by HQLA category; and
- projected net cash outflow amounts.

In addition, covered companies would be required to provide a qualitative discussion of certain features of their LCR results. The required disclosure could be posted on an organization's website or included in a public regulatory report (such as periodic reports filed with the US Securities and Exchange Commission).

Comments on the proposal are due by 2 February 2016.

FRB announces implementation of several recommendations to enhance supervision of large and complex banking organizations

The FRB has announced that it is implementing several recommendations to enhance the supervision of large and complex banking organizations. The recommendations were developed after a large-scale review of Federal Reserve Bank practices to support consistent and sound supervisory decisions as well as methods to resolve differing staff opinions related to the supervision of large and complex firms.

In 2016, the Federal Reserve System intends to develop policies and practices to promote the exchange of, and response to, conflicting staff opinions on all supervisory matters.

To address inconsistencies in documentation and practices, the Operating Committee of the Large Institution Supervision Coordinating Committee (LISCC) will manage the creation of minimum operating and documentation

standards for all supervisory activities. In addition, the Federal Reserve Banks of New York and Richmond have also added assistance to their dedicated supervisory teams to ensure consistency in their supervisory approaches.

FRB adopts rule to limit emergency lending powers

The FRB has approved a final rule specifying its procedures for emergency lending under Section 13(3) of the Federal Reserve Act. The final rule involves a number of changes from the original proposal made in response to comments received on the proposal. The additional modifications are compatible with and provide further support to the revisions made by the Dodd-Frank Act that a program should not be for the purpose of aiding specific companies to avoid bankruptcy or resolution. In addition, the final rule extends the definition of insolvency to cover borrowers who fail to pay undisputed debts as they become due during the 90 days prior to borrowing or who are determined by the Board or lending Reserve Bank to be insolvent. Lastly, the rule includes the requirement in the Dodd-Frank Act that all lending programs under 13(3) also be approved by the Secretary of the Treasury.

The final rule will take effect on 1 January 2016.

RECENT CLIFFORD CHANCE BRIEFINGS

PD3 at a glance – Key features to monitor during the legislative process

This summary chart shows key features in the draft EU Commission proposal to amend the Prospectus Directive published on 30 November 2015.

http://www.cliffordchance.com/briefings/2015/11/pd3_at_a_glance.html

New product documentation for Himaayah Min Taqallub As'aar Assarf (Islamic Cross Currency Swaps)

The publication by the International Swaps and Derivatives Association, Inc. (ISDA) and the International Islamic Financial Market (IIFM) of template product documentation for Himaayah Min Taqallub As'aar Assarf (Islamic Cross Currency Swaps) designed to be used with the ISDA/IIFM Tahawwut Master Agreement marks a further step in the development of standardised documentation for the Islamic finance industry.

This briefing paper discusses the new templates.

http://www.cliffordchance.com/briefings/2015/11/new_product_documentationforhimaayahmi.html

Recognition of EU bail-in clauses – key considerations for the Asia Pacific market

Article 55 of the Bank Recovery and Resolution Directive (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 including relevant liabilities, such as loan agreements, bond documentation and several financial markets 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. These issues are particularly relevant for market participants in Asia Pacific, who regularly enter into contracts governed by local (i.e. non-EU) law.

http://www.cliffordchance.com/briefings/2015/11/recognition_of_eubail-inclauseske.html

First UK Deferred Prosecution Agreement provides important lessons for APAC corporate

In a landmark judgment, the UK courts have approved the first ever application by the Serious Fraud Office (SFO) for a deferred prosecution agreement (DPA) reached with a defendant facing charges under the UK Bribery Act 2010 (UKBA). The agreement illustrates the high degree of international co-operation in bribery investigations and has important lessons for corporates in how best to deal with regulators and prosecutors when facing accusations of bribery. The conduct in question took place outside the UK, highlighting both the extra-territorial effect of the UKBA, and the SFO's stated commitment to enforcing the legislation worldwide.

This briefing paper discusses the implications of this first approved DPA.

http://www.cliffordchance.com/briefings/2015/12/double_first_forsfoprovidestemplatefo.html

Enforcement of JOA forfeiture provisions following the Supreme Court decision in Cavendish Square Holdings B.V. v. Makdessi [2015] UKSC 67

Parties to Joint Operating Agreements ('JOAs') have long been concerned about the risk that the default provisions might prove unenforceable, on the basis that they constitute penalty clauses. Those drafting JOA default provisions have struggled to balance a desire for strong remedies against defaulting parties, with the need to ensure

provisions are enforceable. As a consequence, model form JOAs have increasingly included more nuanced default provisions, including call options (at an undervalue) and withering provisions. These have generally come to be regarded as less likely to fall foul of the rule against penalty clauses than simple forfeiture clauses. The recent Supreme Court decision in Cavendish Square Holdings B.V. v. Makdessi [2015] UKSC 67 has recast the test for penalties in such a way as to reduce this anxiety and to increase the latitude of parties to agree remedies for default. Risks on enforceability remain, but, in general, JOA default provisions may now be less likely to be deemed unenforceable on grounds that they are a penalty.

This briefing paper discusses the Supreme Court's decision and its implications for JOA forfeiture clauses.

http://www.cliffordchance.com/briefings/2015/11/enforcement_of_joaforfeitureprovision.html

Contractual terms will only be implied if necessary

The Supreme Court has emphasised that English law takes a strict approach to the implication of terms into a contract. Terms will not be implied just because it would be reasonable to do so, but only if it is necessary because the contract would lack commercial or practical coherence without the implied term. And the more detailed the contract is, the more difficult it will be to imply a term.

This briefing paper discusses the Supreme Court's decision in Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72.

http://www.cliffordchance.com/briefings/2015/12/contractual_termswillonlybeimpliedi.html

A crown of thorns – misselling claim against bank fails

Misselling claims against banks have a poor record in the English courts. A few claimants have won, but most cases that have gone to trial in the last few years have proved unsuccessful. A recent case has added to this record of failure. The judge recognised that a bank selling interest rate swaps does not accept the responsibilities of an adviser just because it provides information about a swap and views on likely interest rate movements. Further, the documentation for the swap was sufficient to prevent any liability arising.

This briefing paper discusses the decision.

http://www.cliffordchance.com/briefings/2015/11/a_crown_of_thornsmissellingclaimagainstban.html

Double First for SFO provides template for corporate bribery settlements

On 30 November 2015, the first deferred prosecution agreement (DPA) reached between the UK Serious Fraud Office (SFO) and a co-operating corporate defendant received final approval from the Court. The DPA has been reached in the first concluded case in which action has been taken against a corporate organisation for the offence of failing to prevent bribery committed by two officials of a foreign associated company of a UK bank, under section 7 of the Bribery Act 2010.

This briefing paper discusses the case.

http://www.cliffordchance.com/briefings/2015/12/double_first_forsfoprovidestemplatefo.html

New Dutch security breach notification rules – are you prepared?

As of 1 January 2016, new rules will enter into force under the Dutch Data Protection Act. Data controllers will be obliged to notify the Dutch Data Protection Authority, and in certain cases also data subjects, of serious security breaches impacting personal data. In addition, the Dutch Data Protection Authority's powers of enforcement will be significantly enhanced, allowing for the imposition of fines for data protection violations up to EUR 810,000 or even 10% of a company's annual net turnover per violation. At the same time, the enforcement of the Data Protection Act is said to be intensified, all of which makes compliance a risk control topic to be addressed at a board room level.

This briefing paper discusses the new rules and the preparatory actions to be taken.

http://www.cliffordchance.com/briefings/2015/12/new_dutch_securitybreachnotificationrulesar.html

Grande Holdings Ltd. – is an amount due under a complex derivatives arrangement a liquidated sum?

In its recent decision in the winding-up of Grande Holdings Ltd, the Hong Kong Court of Appeal unanimously held that an amount due under a complex derivatives contract was a liquidated sum, thus reversing the lower court's decision.

This briefing paper looks at some of the implications of the Grande Holdings Ltd. decision for potential creditors under derivative or structured products arrangements.

http://www.cliffordchance.com/briefings/2015/11/grande_holdings_ltdisanamountdueunder.html

Establishment and meetings of the Council of Experts concerning compliance with Japan's Corporate Governance Code

In respect of the Corporate Governance Code established by the Tokyo Stock Exchange on 1 June 2015, the first meeting of the Council of Experts concerning compliance with the Code was held on 24 September 2015 and two further meetings have been held to date. The council has agreed to continue regular discussions on the compliance status in respect of the Code and any related issues.

This briefing paper sets out an outline of the Code and the publication obligations which have already been introduced, and then briefly explains how the newly established council is positioned.

http://www.cliffordchance.com/briefings/2015/12/establishment_andmeetingsofthecouncilo0.html

Revisions to Exemptions from the Insider Trading Regulations for Transactions based on 'Agreements Prior to Obtaining Information' or 'Plans Prior to Obtaining Information', and for 'Counterbid'

A new comprehensive exemption from insider trading regulations has been introduced for transactions based on an 'agreement prior to obtaining information' or a 'plan prior to obtaining information'. The comprehensive exemption was implemented by an amendment to the Cabinet Office Ordinance concerning the Regulation of Securities Transactions, etc., which came into force on 16 September 2015. In addition, the interpretation of the exemption clause for a 'counterbid' was clarified through an amendment of the Guidelines to the Financial Instruments and Exchange Act on the same day. As a result of these amendments, it is expected that certain previously restricted transactions will become more widely available.

This briefing paper discusses the amendments.

http://www.cliffordchance.com/briefings/2015/11/revisions_to_exemptionsfromtheinsidertradin0.html