

International Regulatory Update

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AIFMD: EU Commission invites ESMA to carry out further work on passport

The EU Commission [has written](#) to the European Securities and Markets Authority (ESMA) regarding ESMA's opinion and advice on the Alternative Investment Fund Managers Directive (AIFMD) passport.

In July 2015, ESMA sent the Commission, EU Parliament and EU Council its advice on the application of the AIFMD passport to non-EU alternative investment fund managers (AIFMs) and alternative investment funds (AIFs) and its opinion on the functioning of the passport for EU AIFMs and on the national private placement regimes (NPPRs).

The Commission supports ESMA's approach of analysing the grant of the AIFMD passport to managers and funds on a country-by-country basis, and asks ESMA to complete by 30 June 2016:

- the assessment of the USA, Hong Kong and Singapore, which were selected for the first wave of assessments but for which to date no advice has been provided; and
- the assessment of a further six jurisdictions: Japan, Canada, Isle of Man, Cayman Islands, Bermuda and Australia.

With regard to third country enforcement of AIFMD rules, the Commission also invites ESMA to provide a more detailed assessment of the capacity of supervisory authorities and their track record in ensuring effective enforcement, and a preliminary assessment of the expected inflow of funds by type and size into the EU from relevant third countries.

The EU Commission welcomes ESMA's suggestion of another opinion on the functioning of the EU passport and NPPRs once the AIFMD has been transposed in all Member States, and suggests that it would be helpful for the opinion to be available prior to the planned review of the AIFMD in 2017.

Iran: EU Council lifts all nuclear-related economic and financial sanctions

The EU Council [has lifted](#) all nuclear-related economic and financial EU sanctions against Iran. This follows verification by the International Atomic Energy Agency (IAEA) on 16 January 2016 that Iran has implemented the agreed nuclear-related measures as set out in the Joint Comprehensive Plan of Action (JCPOA).

A limited number of EU sanctions against Iran were already suspended after China, France, Germany, Russia, the

United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy, reached an interim agreement with Iran; the Joint Plan of Action of 24 November 2013 set out an approach towards reaching a long-term comprehensive solution to the Iranian nuclear issue. The lifting of all EU economic financial sanctions taken in connection with the Iranian nuclear programme supersedes this limited sanctions relief.

Capital Markets Union: EU Parliament adopts resolution on stocktaking and challenges of EU financial services regulation

The EU Parliament has adopted a non-legislative [resolution](#) on stocktaking and challenges of the EU financial services regulation. The Parliament welcomes the Commission's Capital Markets Union (CMU) project and recognises the achievements of financial regulation in responding to the ramifications of the financial crisis. The Parliament believes that overly complex regulation can affect investment negatively and contends that the complexity of regulation must also be addressed regarding its application to non-financial end-users of financial products.

Amongst other things, the resolution calls for:

- the Commission, when reviewing the European Market Infrastructure Regulation (EMIR), to examine the effect that lowering the quality of collateral accepted by central counterparties (CCPs) could have on the resilience of CCPs;
- the Commission and supervisors to address the interaction between International Financial Reporting Standards (IFRS) and prudential requirements;
- a stronger focus in policy making on the global competitiveness of the EU financial sectors without detriment to financial stability and consumer protections, and underlines that the CMU project must be seen in the context of improving the competitiveness of European business and the EU economy; and
- the Commission to propose a consistent, practical and transparent framework for procedures on third country equivalence, and for all equivalence decisions to be adopted by means of delegated acts; and
- the Commission services to conduct a comprehensive quantitative and qualitative assessment every five years of the cumulative impact of EU financial services regulation on financial markets and its participants at EU and Member State level in order to identify

shortcomings and loopholes, to assess the performance, effectiveness and efficiency of the regulation, and to report back to Parliament, with the first of these assessments to be completed by the end of 2016.

EMIR: ESRB reports on systemic risk implications of CCP interoperability arrangements

The European Systemic Risk Board (ESRB) has submitted a [report](#) to the EU Commission on the systemic risk implications of central counterparty (CCP) interoperability arrangements under Article 85(4) of EMIR.

The report concludes that the EU's current regulatory framework is sound, but identifies the following areas as meriting further work and clarification:

- ensuring a harmonised framework – the ESRB believes that, while the flexibility provided to national authorities in the interpretation of the EMIR Level 1 text and ESMA's guidelines has not resulted in inconsistent national frameworks, there is scope for more granular and prescriptive regulation;
- recovery and resolution – the report recommends clarification of the manner in which interoperability arrangements operate at the end of each CCP's default waterfall if there is an uncovered inter-CCP exposure, and as to whether and how interoperability arrangements may increase the likelihood of successful portability or affect other relevant default management devices;
- interoperability arrangements for derivatives – the report argues that further analysis is needed regarding the specificities and complexities relating to potential new derivatives links – particularly the complexities relating to potential OTC (as currently classified) derivatives links; and
- the role of the ESRB – the report argues that the ESRB should be given a consultative role in the development of any future guidelines and rules pertaining to interoperability.

CRR: EBA consults on draft guidelines on implicit support for securitisation transactions

The European Banking Authority (EBA) has published a [consultation paper](#) on draft guidelines on implicit support for securitisation transactions. Under the Capital Requirements Regulation (CRR), restrictions are placed on providing implicit support to securitisations. Recognising the potential for diverging interpretations in respect of what constitutes implicit support, the CRR sets out in Article

248(2) a specific mandate for the EBA to issue guidelines on what constitutes arm's length conditions and when a transaction is not structured to provide support. The consultation paper sets out the EBA's proposed guidelines.

The EBA's draft guidelines apply to transactions an institution is under no contractual obligation to enter into at all or is not under a contractual obligation to enter into on the specific terms of such transaction. The draft guidelines propose an objective test for the definition of arm's length conditions and for assessing when a transaction is not structured to provide support. Furthermore, guidance is provided on those elements that should be considered when assessing whether a transaction is not structured to provide support and on the notification requirements applicable to such transactions. The draft guidelines also include provisions to avoid a scenario whereby support is provided on behalf of the originator by another entity.

Comments to the consultation close on 20 April 2016.

CRD 4: UK recognises shorter transitional periods for capital buffers imposed by other Member States

The ESRB has published a [letter](#), written by the Bank of England's (BoE's) Executive Director for Financial Stability Strategy and Risk, Alex Brazier, and addressed to the ESRB, EU Commission, EBA and relevant supervisory colleges, to notify them of the UK's recognition of shorter transitional periods imposed by other Member States in respect of the capital conservation buffer and the countercyclical capital buffer under Article 160(6) of the Capital Requirements Directive (CRD 4).

The notification specifies that the UK has decided to recognise all Member States' shorter transitional periods from 2016.

PRA publishes policy on written auditor reporting requirements

The Prudential Regulation Authority (PRA) has published its final policy statement ([PS1/16](#)) and supervisory statement ([SS1/16](#)) on the engagement between external auditors and supervisors. The policy statement sets out the PRA's feedback to the responses it received to its February 2015 consultation and the final policy, which specifies that external auditors of certain deposit-taking institutions will be required to submit annual written reports to the PRA.

Deposit-taking institutions that are UK-headquartered with a balance sheet great than GBP 50 billion, either on an individual or consolidated basis, and are not subsidiaries of non-UK firms will be in-scope for written auditor reporting.

The supervisory statement published alongside the policy statement sets out the PRA's expectations of auditors in relation to the written auditor reporting requirement and is intended to be used by auditors when questions are being discussed and when the report is being submitted. The supervisory statement relates to:

- logistical and timing issues;
- the scope of questions and content of the report;
- disclosure of the report;
- cooperation with the PRA; and
- duties of auditors and firms.

The written auditor reporting requirement will commence during the audit cycle for financial reporting periods ending on or after 1 November 2016.

The PRA has also updated its [statement of policy](#) on its approach to enforcement, first published on 1 April 2013, to reflect, among other things, the statements of policy set out in PS1/16, including a new statement of the PRA's policy on the imposition and amount of financial penalties on persons who are, or have been, auditors and actuaries of a PRA-authorised person under the Financial Services and Markets Act (FSMA) 2000 and appointed under or as a result of a statutory provision.

FCA consults on client money segregation rules for crowdfunding platforms

The Financial Conduct Authority (FCA) has launched a consultation ([CP16/4](#)) on the segregation of client money by loan-based crowdfunding platforms. The FCA is proposing changes to its client money rules for firms that operate electronic systems in relation to peer-to-peer (P2P) platforms and hold both money for clients in relation to regulated P2P agreements under the FCA's client money rules (CASS 7) and money for clients in relation to unregulated lending.

Currently an investor's money held by a firm in relation to P2P agreements must be segregated from the firm's own money and any other money, including in relation to unregulated business to business (B2B) agreements. The FCA proposes changing its rules to allow firms that hold money in relation to P2P and B2B agreements to be able to elect to hold both kinds under CASS 7 if they wish. Firms may then segregate P2P and B2B monies together, but separately from the firm's money, without breaching CASS 7.

Comments to the consultation close on 11 February 2016.

Financial Services Compensation Scheme: PRA and FCA consult on management expenses levy limit

The PRA and FCA have launched a [joint consultation](#) on the proposed management expenses levy limit (MELL) for the Financial Services Compensation Scheme (FSCS) for 2016/17.

Under the Financial Services and Markets Act 2000 (FSMA), the PRA and the FCA must set a limit on the total management expenses to be levied. The MELL represents the maximum amount of management expenses that the FSCS can levy in order to fulfil the obligations imposed on it by PRA and FCA rules, although it is not necessarily the amount the FSCS will actually levy in the coming year.

The consultation closes on 15 February 2016. The proposed levy limit of GBP 72.7 million would apply from 1 April 2016, the start of the FSCS's financial year, to 31 March 2017.

Dutch Minister of Finance confirms that general banking tax will remain in place

The Dutch Minister of Finance [has informed](#) the Parliament of the [Ministry of Finance's evaluation](#) of the Act on the General Banking Tax (Wet bankbelasting).

The General Banking Tax was introduced in 2012, with a view to:

- obtaining a financial contribution from regulated banks in respect of the implicit government guarantee for the banking sector (i.e. government bail-outs during the financial crisis);
- contributing to risk mitigation by banks; and
- counteracting excessive remuneration of bank directors (note that the tariff applied to the taxable amount depends on the remuneration of directors).

Three years after its introduction, the General Banking Tax has been evaluated by the Ministry of Finance against the objectives which the Act pursues.

The Ministry has concluded that, although the effect on individual banks' risk management is difficult to assess in light of recent regulatory developments affecting banks, and while the effect on remuneration of directors seems only limited, the General Banking Tax effectively contributes to the funding of the government (which, it notes, is the purpose of all taxes) and can be levied from banks relatively easily.

The Ministry has therefore concluded that the tax should remain in place.

CSSF provides update on enforcement of 2015 financial information published by issuers of securities subject to Transparency Law

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a [press release](#) providing information in relation to the 2015 financial information published by issuers of securities subject to the Luxembourg Transparency Law.

The purpose of the press release is to provide information on the financial reporting topics identified by the European Securities and Markets Authority (ESMA) together with national accounting enforcers, including the CSSF, which will be specifically monitored during their enforcement campaign.

In addition to these common priorities, the CSSF has decided also to identify and include in its 2016 enforcement campaign a few other topics, as set out in more detail in the press release, which concern:

- the application of IFRS standards on consolidation;
- the recognition and measurement of deferred tax assets; and
- the quality of disclosures in financial statements.

MAS consults on proposed amendments to Securities and Futures (Reporting of Derivatives Contracts) Regulations

The Monetary Authority of Singapore (MAS) has published a [consultation paper](#) on proposed amendments to the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 to implement reporting of commodity and equity derivatives contracts, as well as other revisions to complete the implementation of the over-the-counter (OTC) derivatives trade reporting regime in Singapore.

Amongst other things, the consultation paper invites comments on the following proposals:

- to subject commodity derivatives contracts (except certain physically-settled commodity derivative contracts) to reporting obligations;
- to subject equity derivatives contracts, other than exchange-traded equity derivatives contracts, to reporting obligations;
- data fields for reporting of commodity and equity derivatives contracts;
- to include two additional data fields of booking location and trading desk location for all specified derivatives contracts;

- to include data fields for reporting of collateral information;
- to exempt for non-bank financial institutions with annual aggregate gross notional amount of specified derivatives contracts of less than SGD 5 billion, approved trustees and licensed trust companies from reporting obligations;
- to exclude brokers and banks from having to report derivatives transactions where their counterparties are retail investors;
- commencement dates for the additional data fields of booking location, trader desk location and collateral information;
- commencement of reporting of commodity and equity derivatives contracts by banks and merchant banks from 1 November 2016;
- commencement of new reporting phases for non-bank financial institutions, starting with interest rates and credit derivatives contracts which are traded in Singapore from 1 November 2017, followed by the reporting of foreign exchange, commodity and equity derivatives from 1 November 2018;
- to apply the same timelines for non-bank financial institutions to significant derivatives holders; and
- draft amendments to the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013.

Comments on the consultation paper are due by 15 February 2016.

KRX publishes list of major regulation changes for its markets in 2016

The Korea Exchange (KRX) has published the [list](#) of major regulation changes for its markets in 2016. The list includes the following changes:

- adjustment of tick size of the Mini KOSPI 200 Options (Derivatives Market Business Regulation);
- change to the order of financial resources that are used to perform settlement, etc. (membership regulation);
- exemption from the securities transaction tax for market makers of stock index derivatives for hedge trades (Restriction of Special Taxation Act);
- increased capital requirements of members for the stability of settlement (membership regulation and Derivatives Market Business Regulation);
- introduction of market maker for low liquidity issues (KOSPI/KOSDAQ Business Regulation);

- modification of the trading method for super low liquidity issues (KOSPI/KOSDAQ Business Regulation); and
- introduction of trade stability systems in stock markets (KOSPI /KOSDAQ/KONEX Business Regulation).

FSC responds to increased volatility in HSCEI-linked ELS market

The Financial Services Commission (FSC) [has announced](#) that it will strengthen monitoring and supervision of Korea's equity-linked securities (ELS) market as the volatility in the Hang Seng China Enterprise Index (HSCEI) increases. The announcement came in response to a recent sharp fall in the HSCEI which affected the ELS market in Korea.

To make sure brokerage firms manage their capital raised through ELS issuance in a sound and transparent manner, the Regulation on Financial Investment Business will be amended to handle such capital separately from other proprietary assets in accounting. The FSC will keep monitoring whether brokerage firms properly manage hedging assets. The FSC will also examine sales practices for ELS products, particularly checking whether brokerage firms are providing sufficient explanations to customers to ensure that consumers are fully aware of possible investment risks when they purchase ELS products.

SEC announces 2016 examination priorities

The Office of Compliance Inspections and Examinations (OCIE) of the US Securities and Exchange Commission has released its [2016 examination priorities](#) for broker-dealers and investment advisers. Areas of focus for this year include:

- cyber security compliance and controls;
- exchange-traded fund sales strategies, trading practices, and disclosures;
- anti-money laundering policies and procedures;
- private placements including due diligence, disclosure, and suitability concerns involving EB-5 Programs; and
- private fund advisers and their fee and expense practices.

The OCIE also intends to conduct focused, risk-based examinations of selected registered investment advisers and investment company complexes that have not been examined yet.

FINRA publishes 2016 regulator and examination priorities letter

The US Financial Industry Regulatory Authority (FINRA) has published its [11th annual Regulatory and Examination Priorities Letter](#). The letter discusses both emerging and existing risks that FINRA believes could adversely affect investors and market integrity in 2016.

The 2016 letter focuses on the importance of supervision, risk management and controls, and liquidity. FINRA also intends to increase its scrutiny of member firm culture, conflicts of interest and ethics, and the significant role each of these issues plays in how a firm conducts business. Other areas of priority will include:

- firms' monitoring of excessive concentrations and recommendations, particularly regarding complex, speculative, or illiquid products;
- information leakage leading to front-running and other regulatory concerns;
- cybersecurity preparedness;
- suitability issues created by complex, speculative, or longer-term investments, including exchange-traded products, structured products, and emerging market funds;
- private placements with respect to suitability, disclosure, and due diligence involving various types of private placements, including EB-5 investment funds;
- non-traded REITs and direct participating programs in light of recent SEC rulemaking in this area;
- exchange-traded product concerns in both primary and secondary market transactions; and
- market access concerns including new 'compliance report cards' focused on 'layering' and 'spoofing', which will be generated by FINRA's cross-market equity manipulation surveillance program.

RECENT CLIFFORD CHANCE BRIEFINGS

Iran Sanctions 'Implementation Day' – What You Need To Know

16 January 2016 has been designated 'Implementation Day' under the Joint Comprehensive Plan of Action (JCPOA), meaning that the sanctions relief promised in return for International Atomic Energy Agency verification that Iran has met its relevant nuclear-related obligations has now taken effect.

This briefing paper considers the extent of the sanctions relief now in place, the sanctions that remain and the compliance challenges for those pursuing opportunities offered by these developments.

http://www.cliffordchance.com/briefings/2016/01/iran_sanctions_implementationdaywhatyo.html

The Asia Pacific Top Ten FCPA Activities of 2015

Of the twelve corporate actions resolved in 2015, almost half of which had a significant Asia Pacific connection, ten were subject to civil resolution by the US Securities and Exchange Commission (SEC) only, with just two being subject to criminal resolution by the US Department of Justice (DOJ). While 2015 was notable for this increase in the number of resolutions based on books-and-records and internal controls violations, the drop in DOJ corporate prosecutions should be seen as temporary given the DOJ's recent staffing increases.

This briefing paper sets out our top ten list for 2015, which considers all five of the corporate prosecutions in 2015 that featured a significant Asia Pacific connection, and also looks at a number of other Foreign Corrupt Practices Act (FCPA)-related actions and activities pertinent to companies operating in the Asia Pacific region. In each case, the key points for clients to consider when implementing and managing anti-corruption policies and programmes in the region going forward are highlighted.

http://www.cliffordchance.com/briefings/2016/01/the_asia_pacifictoptenfcpaactivitiesof2015.html

Codere – The Case for Good Forum Shopping

In December 2015, the Codere Group obtained the English Court's approval of a scheme of arrangement to implement its long-running EUR 1.2 billion financial restructuring. The proposed Scheme had received a level of notoriety having been described by the Court at an earlier hearing as an

example of 'extreme forum shopping'. However, the subsequent sanction hearing demonstrated that, whilst the Scheme had some relatively novel aspects, it was consistent with the English Courts' general wish to assist restructurings, including of foreign groups, particularly in the absence of other viable alternatives. In the present case, a refusal to sanction the scheme could have resulted in a loss of approximately EUR 600 million to creditors.

This briefing paper discusses this case.

http://www.cliffordchance.com/briefings/2016/01/codere_the_case_forgoodforumshopping.html

Your 2016 AGM and Beyond

The forthcoming AGM season will raise some challenges, not least the heightened focus on financial reporting and risk management in the Corporate Governance Code. This is first time that most companies will prepare a long-term viability statement and have to undertake the diligence to enable them to make that statement.

This briefing paper discusses this change and other key developments affecting this season's AGMs.

http://www.cliffordchance.com/briefings/2016/01/your_2016_agm_andbeyond.html

Taxation of certain financial institutions – new regulations

This briefing paper discusses the so-called bank tax introduced by the Act on Tax on Certain Financial Institutions of 15 January 2016. The government estimates that the bank tax may bring the State budget PLN 4-5 billion in the form of tax revenues. The provisions of the new legislative act will enter into force from 1 February 2016.

http://www.cliffordchance.com/briefings/2016/01/taxation_of_certainfinancialinstitutionsne0.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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