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Briefing note

International Regulatory Update

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SFTR published in Official Journal

The Regulation on transparency of securities financing transactions and of reuse (SFTR) has been published in the Official Journal.

Among other things, the Regulation introduces new information and execution conditions on the reuse of financial collateral, disclosure requirements on the use of securities financing transactions (SFTs) and total return swaps by collective investment schemes, and new requirements to report SFTs to a trade repository by T+1.

Transitional provisions mean that there will be a phased implementation of most requirements, although some requirements will apply from the date the Regulation enters into force, including record-keeping requirements for SFTs (Art. 4(4)), transparency requirements for pre-contractual documents for new funds (Art. 14) and an obligation to establish internal procedures for reporting breaches (Art. 24(3)).

The Regulation will enter into force on 12 January 2016.

PSD 2 published in Official Journal

The recast Payment Services Directive (PSD 2) has been published in the Official Journal. PSD 2 will enter into force on 12 January 2016 and must be transposed by Member States into their national law by 13 January 2018, which is the date from which the rules will apply.

PSD 2 will repeal Directive 2007/64/EC (PSD 1) and includes rules on:

- emerging payment services, including internet and mobile payments;
- payment security; and
- harmonisation of the supervisory framework by national competent authorities (NCAs).

MAR: Commission Implementing Directive on reporting infringements published in Official Journal

A Commission Implementing Directive (596/2014) on reporting infringements under the Market Abuse Regulation (MAR) to competent authorities has been published in the Official Journal.

The Implementing Directive sets out procedures for reporting actual or potential infringements and considerations in relation to protection of personal data of both the reporting and reported persons in order to avoid unfair treatment or reputational damages. Where transmission of personal data is necessary to investigate a report of infringements, competent authorities should preserve the confidentiality to the maximum extent possible in accordance with national law. Moreover, Member States should ensure the right of defence of the reported person, including the right to access the file, the right to be heard

and the right to seek effective remedy against a decision concerning the reported person under the applicable procedures set out in national law in the context of investigations or subsequent judicial proceedings.

The Implementing Directive will enter into force on 10 January 2016 and should be transposed by Member States by 3 July 2016, the date of application of MAR.

MAR: EU Commission adopts draft Delegated Regulation

The EU Commission has adopted a draft Commission Delegated Regulation, dated 17 December 2015, supplementing MAR, which sets out detailed rules in relation to:

- the extension to the exemption to certain public bodies and central banks of third countries from the obligations and prohibitions set out in MAR in carrying out monetary, exchange-rate or public debt management policy;
- indicators of market manipulation;
- minimum thresholds for the exemption of certain participants in the emission allowance market from the requirements to publicly disclose inside information;
- determination of the competent authority for the notifications of delays of public disclosure of inside information;
- circumstances under which trading during a closed period may be permitted by the issuer; and
- types of transaction triggering the duty to notify managers' transactions.

The Regulation will enter into force on the twentieth day following its publication in the Official Journal and will apply from 3 July 2016.

MiFID2: ESMA publishes final guidelines on cross-selling practices

The European Securities and Markets Authority (ESMA) has published its final guidelines on cross-selling practices under MiFID2. The Joint Committee of the European Supervisory Authorities launched a consultation on draft guidelines on cross-selling practices in December 2014, which were intended to comply with the specific requirements under MiFID2 in addition to regulating the conduct of firms operating in all sectors within the scope of the ESAs. However, in light of legal concerns arising from some directives in the banking and insurance sectors, the ESAs have decided not to issue joint guidelines but instead agreed that ESMA should adopt the guidelines on the sole basis of MiFID2 in order to meet its mandated deadline to issue guidelines by 3 January 2016.

The final guidelines relate to the meaning of cross-selling practices within the context of MiFID2, i.e. the offering of an investment service together with another service or product as part of a package or as a condition for the same agreement or package. The guidelines will apply irrespective of the sales channel used and include principles on:

- improving the content of disclosures on price, costs and other non-price features when different products are cross-sold with one another;
- requiring firms to provide investors with all relevant information in a timely and clear manner;
- addressing conflicts of interest arising from remuneration models;
- improving client understanding on whether purchasing individual products offered in a package is possible; and
- clarifying the application of any post-sale cancellation rights attached to the purchase of one of the products.

The final guidelines will apply from 3 January 2017.

MiFIR: ESMA consults on draft guidelines on transaction reporting and record keeping

ESMA has launched a consultation on draft guidelines on the application of the provisions of the ESMA regulatory technical standards (RTS) on transaction reporting, reference data, record-keeping and clock synchronisation (RTS 22, 23, 24 and 25) under MiFIR.

The draft guidelines are addressed to investment firms, approved reporting mechanisms (ARMs), trading venues and systematic internalisers (SIs) and focus on the construction of transactions reports and order data records, field by field. In particular the guidelines specify:

- individual scenarios applicable to a given transaction reporting activity;
- scenarios applicable to specific order record keeping activities; and
- clarifications on the application of clock synchronisation requirements.

In the consultation paper, ESMA notes that the guidance should be considered as a work in progress and some areas have been flagged for further consideration.

Comments on the consultation are due by 23 March 2016.

EBA consults on draft guidelines on stress testing

The European Banking Authority (EBA) has launched a consultation on draft guidelines on stress testing, which are intended to promote consistent practices to be followed by institutions and competition authorities for stress testing across the EU.

The draft guidelines set out set out the EBA's expectations of institutions' stress testing programmes to be complied with when designing and conducting a stress testing programme and provide greater detail on issues that have gained importance, including:

- liquidity risks;
- conduct risk and litigation costs;
- FX lending risks;
- business models;
- data aggregation; and
- the use of reverse stress testing.

The guidelines also describe a range of supervisory stress tests to support competent authorities in their qualitative assessment of stress testing programmes and in their use of stress test quantitative outcomes for the implementation of the supervisory review and evaluation process (SREP).

Comments on the consultation are due by 18 March 2016. The EBA aims to publish the final guidelines in the second quarter of 2016.

EBA consults on draft guidelines for remuneration of sales staff

The EBA has launched a consultation on draft guidelines for remuneration policies and practices related to sales staff. The consultation has been published in response to significant cases of misconduct and mis-selling by staff in financial institutions in which poor remuneration policies and practices were identified as key underlying drivers for mis-selling of financial products and services.

The EBA intends to address this issue through draft guidelines for the remuneration of staff employed by credit institutions, creditors, credit intermediaries, payment institutions and electronic money institutions, when providing deposits, payment accounts, payment services, electronic money, mortgages, and other forms of credit to consumers. The guidelines set out a proposed framework for financial institutions to implement remuneration practices and policies that are intended to improve links between incentives and the fair treatment of consumers, in order to reduce the risk of mis-selling and related conduct costs for firms. Among other things, the EBA proposes that firms should retain policies and practices for at least five years and make documentation available to competent authorities on request.

Comments on the consultation are due by 22 March 2016.

CRD 4: EBA issues opinion on maximum distributable amount

The EBA has published an opinion on the trigger, calculation and transparency of the maximum distributable amount (MDA) under the Capital Requirements Directive (CRD 4). The opinion clarifies that the MDA should be calculated by taking into account both minimum (Pillar 1) and additional (Pillar 2) capital requirements as well as the combined buffer requirement.

The opinion is intended to support the consistent application of distribution restrictions laid down in CRD 4 in order to promote a level playing field across the Single Market and to give greater certainty for banks' capital planning needs. In particular, the opinion clarifies the stacking order of capital requirements, with Pillar 1 and Pillar 2 sitting at all times beneath the combined buffer.

In its opinion, the EBA recommends that the EU Commission should review Article 141 of CRD 4 in order to ensure consistency with the stacking order of capital requirements and to enable limited supervisory flexibility regarding distributions.

CRD 4: EBA publishes final guidelines on remuneration policies and opinion on proportionality

The EBA has published final guidelines on sound remuneration policies under CRD 4. The guidelines are addressed to institutions, on an individual, consolidated and sub-consolidated basis, and competent authorities, which are required to ensure their application at all levels.

The guidelines are intended to ensure that institutions calculate the so-called 'bonus' cap correctly and consistently by setting out specific criteria for the allocation of all remuneration components into either fixed or variable pay. Parts of the guidelines are applicable to all staff, while others focus on the specific provisions applicable for the remuneration policies relating to identified staff and the guidelines are intended to clarify the process for identifying relevant categories of staff to whom specific remuneration provisions of CRD 4 apply. The guidelines set out the requirements for remuneration policies and their

governance arrangements, including how specific remuneration elements such as allowances, sign-on bonuses, retention bonuses and severance pay should be recognised over time.

The guidelines will apply from 1 January 2017, to allow institutions sufficient time to adjust their remuneration policies in 2016. Previous guidelines on remuneration policies and practices issued by the Committee of European Banking Supervisors (CEBS), the EBA's predecessor organisation, will be repealed on 31 December 2016.

Alongside the guidelines, the EBA has also published an opinion addressed to the EU Commission, EU Council and EU Parliament on the application of the principle of proportionality to the remuneration provisions in CRD 4. In its opinion, the EBA sets out its view that a more harmonised approach to the application of the remuneration requirements is essential and proposes legislative amendments to CRD 4. The EBA highlights the variation in national rules regarding the application of proportionality, including waivers, which has led to an uneven playing field between institutions in the EU. In particular, the EBA proposes exemptions under specific conditions, although the EBA does not view that the 'bonus cap' should be subject to any exemption.

CRD 4: EBA updates application date for ITS on benchmarking portfolios

The EBA has published an update on the application date of its final draft implementing technical standards (ITS) on benchmarking portfolios under CRD 4.

In its final draft ITS, the EBA proposed a remittance date of 11 April each year for the majority of the data to be submitted by banks to competent authorities, beginning 11 April 2016. The EBA has clarified that although it submitted its final draft ITS to the EU Commission in March 2015, the Commission has not yet adopted the final draft ITS making it likely that the proposed remittance dates for 2016 will be postponed and that the remittance date for initial market valuation (IMV) data will be combined with the remittance date for other ITS templates.

The remittance dates will be specified once the ITS are published in the Official Journal.

ESAs publish compliance table on supervision of financial conglomerates

The Joint Committee of the European Supervisory Authorities (ESAs), comprising the EBA, ESMA and the European Insurance and Occupational Pensions Authority (EIOPA), has published a table setting out which competent authorities comply or intend to comply with the ESAs' Joint Guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates.

Banking Union: SRB and ECB sign MoU

The Single Resolution Board (SRB) and the European Central Bank (ECB) have signed a memorandum of understanding (MoU) relating to cooperation and the exchange of information in relation to their respective responsibilities under the Single Resolution Mechanism (SRM) Regulation and the Single Supervisory Mechanism (SSM) Regulation. The MoU covers information exchange with respect to all institutions directly supervised by the ECB under the SSM and all other cross-border groups or entities under direct responsibility of the SRB, as the resolution authority under the SRM.

BRRD: LMA publishes recommended form of bail-in clause

The Loan Market Association (LMA) has published a recommended form of clause on the contractual recognition of bail-in under the EU Bank Recovery and Resolution Directive (BRRD) for use in loan documentation. Under Article 55 of the BRRD, EEA firms and other in-scope entities are required to include a contractual recognition of bail-in clause in various non-EEA law governed contracts and Member States are required to implement Article 55 into national law by 1 January 2016.

In drafting its recommended form of bail-in clause, the LMA has worked with the Loan Syndications and Trading Association (LSTA) and Asia Pacific Loan Market Association (APLMA) to ensure that their bail-in clauses are as consistent as possible. The LMA has also published a common EU Bail-In Legislation Schedule, which will be referred to in the LMA, LSTA, APLMA and also International Capital Markets Association (ICMA) forms of bail-in clause, which is intended to set out the relevant national implementation legislation and write-down and conversion powers.

Please note that these documents are only available to LMA members.

Basel Committee consults on guidelines on supervision and financial inclusion

The Basel Committee on Banking Supervision (BCBS) has published a consultative document on guidance for the

regulation and supervision of institutions relevant to financial inclusion.

The paper builds on previous work by BCBS and is intended to provide additional guidance on the application of the Committee's core principles for effective banking supervision to the supervision of financial institutions engaged in serving the financially unserved and underserved. Among other things, the paper reports on the BCBS paper on the range of practice in the regulation and supervision of institutions relevant to financial inclusion published in January 2015 and supervisory guidance for the application of the core principles to microfinance activities, which the BCBS published in 2010.

Comments on guidelines are due by 31 March 2016.

Rating agencies: IOSCO reports on the assessment of creditworthiness and use of external credit ratings

The International Organization of Securities Commissions (IOSCO) has published its final report on sound practices at large intermediaries relating to the assessment of creditworthiness and the use of external credit ratings.

IOSCO believes that identifying sound practices regarding suitable alternatives to credit ratings should reduce the overreliance on credit rating agencies (CRAs) for credit risk assessments, which in IOSCO's view may help increase investor protection and contribute to financial stability.

From its work with market intermediaries in member jurisdictions, IOSCO has set out recommendations for twelve sound practices that regulators could consider as part of their oversight of market intermediaries, which include:

- establishing an independent credit assessment function separate from other business units;
- taking steps to ensure a firm's governing committee receives an appropriate level of information on the amount of credit risk to which the firm is exposed;
- investing in staff and other resources necessary to develop a robust internal credit assessment management system that appropriately reflects the nature, scale and complexity of its business;
- avoiding exposure to particular credit risks whenever the firm does not have the internal capability to independently and adequately assess the exposure;
- avoiding mechanistic reliance on external CRA ratings; and
- ensuring regular independent reviews of credit policies and procedures.

IOSCO reports on business continuity plans for trading venues and intermediaries

IOSCO has published two reports on the ability of financial markets and intermediaries to manage risks, withstand shocks and resume their services in the event of disruption.

A report on trading venue mechanisms to effectively manage electronic trading risks gives an overview of the steps trading venues should take to manage the risks associated with electronic trading and they ways they plan for and manage disruptions through business continuity plans (BCP). IOSCO makes recommendations to help regulators ensure trading venues are able to manage identified risks and proposes sound practices that should be considered by trading venues when developing and implementing risk mitigation mechanisms and BCPs aimed at safeguarding the integrity, resiliency and reliability of their critical systems.

IOSCO has also published a report on market intermediary business continuity and recovery planning, which sets out two standards for regulators and sound practices that regulators could consider as part of their oversight or market intermediaries.

Both reports are based on feedback and responses to consultations, surveys, and roundtables organised with IOSCO members and industry participants.

IOSCO publishes statement on regulation of crowdfunding

IOSCO has published a statement addressing the regulation of crowdfunding and an accompanying paper that reports on members' current or proposed developments in investment-based crowdfunding programmes and emerging trends and issues.

In addition to common investment risks such as conflict of interest, data protection and fraud, IOSCO draws on findings from its report in the statement to highlight to regulators other risks that investors face when investing in crowdfunding, including:

- heightened financial risks
- fraud and money laundering/countering terrorist financing (AML/CFT) risks;
- platform failure;
- illiquidity; and
- suitability or information asymmetry.

The statement notes that because crowdfunding often operates on web or mobile-based platforms, regulators should take into account possible cross-border fundraising. IOSCO notes that while some regimes often restrict cross-border fundraising by requiring the issuer or manager running the funding portal to be incorporated locally, other jurisdictions have considered coordinated approaches with one another in managing the risks and opportunities related to the cross-border aspect of crowdfunding.

CRA: PRA consults on changes to reporting data items

The Prudential Regulatory Authority (PRA) has issued a consultation paper (CP45/15) on proposed changes to Pillar 2 data items (FSA071 to FSA082) and the Pillar 2 reporting instructions.

The Pillar 2 data items and reporting instructions were first published in the PRA's July 2015 Policy Statement (PS17/15), which included an instrument for the Reporting Pillar 2 Part of the PRA Rulebook for CRR firms and a supervisory statement on Pillar 2 reporting (SS32/15). The PRA consultation seeks views on an instrument to amend the Reporting Pillar 2 Part of the PRA Rulebook and update SS32/15 in order to make certain amendments to the required data items and corresponding instructions. The PRA plans to publish a policy statement with finalised rules and an updated version of SS32/15 in January 2016 and intends for changes to apply from February 2016.

The Reporting Pillar 2 Part of the PRA Rulebook will apply from 1 January 2016 and requires firms to report data using the Pillar 2 data items, alongside the submission of their internal capital adequacy assessment process (ICAAP) assessment. This information, together with data already collected in other regulatory reports, supports the implementation of the new Pillar 2 capital framework and in particular, allows the PRA to review a firms' ICAAP and to calculate capital benchmarks for Pillar 2 risks.

Comments on the consultation are due by 18 January 2016.

FCA and PSR agree MoUs with the CMA

The Competition and Markets Authority (CMA) has signed memoranda of understanding (MoUs) with the Financial Conduct Authority (FCA) and Payment Systems Regulator (PSR). The MoUs set out an agreed framework for cooperation between the CMA and the respective regulators for the allocation of cases, sharing of information and the pooling of resources.

The FCA and PSR acquired concurrent competition powers in April 2015, which enables the regulators to exercise competition law powers to enforce prohibitions on anti-competitive agreements, abuse of dominant position and to make market investigation references concurrently with the CMA. The MoUs set out in detail how closer working between the CMA and each of the regulators will work in practice.

Ordinance implementing CSDR in France published

Ordinance n°2015-186, which aligns French law with the provisions of the Central Securities Depositories Regulation (CSDR), has been published in the Official Journal.

The Ordinance amends certain provisions of the French 'code monétaire et financier', notably with respect to the powers of the French Autorité des marchés financiers (AMF) and the Banque de France upon central securities depositories (CSD). The Ordinance has further extended the geographical scope of the CSDR to the overall territory of the French Republic, including overseas territorial communities in the Pacific and New Caledonia. The Ordinance has also expanded the list of entities authorised to participate in securities settlement systems to certain public financial institutions, such as central banks or international financial institutions.

Dutch Ministry of Finance announces date of commencement for Act on credit unions

The Dutch Ministry of Finance has announced the date of commencement for the new Act on credit unions as 1 January 2016, following confirmation of support from the European Commission.

Under the Act, which was published in the State Gazette on 21 July 2015, a credit union is defined as a financial cooperative which admits its members on the basis of their business or profession, and which engages in both the business of soliciting repayable funds from its members and extending credit to such members. Although technically qualifying as a bank, credit unions will be exempt from bank licence requirements but will still be subject to a separate licence requirement and certain ongoing prudential requirements.

Among other things, the Act provides that credit unions will be subject to rules on their internal organisation and integrity of business, liquidity, solvency and requirements to report financial statements to the regulator. The prudential rules are a 'light' version of the legal framework for licensed banks. In order to fall within this special regime, credit unions would have to limit the amount of their borrowings to EUR 100 million and the maximum number of members to

25,000. If the amount of repayable funds is less than EUR 10 million, the credit union will be exempt from all license requirements.

Detailed rules implementing this Act are set out in a ministerial regulation and in a decree, which have both been published.

Polish Financial Supervision Authority consults on draft recommendation on large exposure risk management

The Polish Financial Supervision Authority (PFSA) has launched a consultation on a draft recommendation (Recommendation C) on large exposure risk management. Comments on the consultation are due by 20 January 2016.

The PFSA expects banks to implement Recommendation C by 1 January 2017.

Polish Financial Supervision Authority consults on draft guidelines for brokerage services in the OTC derivatives market

The PFSA is consulting on draft guidelines relating to the provision of brokerage services in the OTC derivatives market.

The draft guidelines set out:

- the role of the authorities of investment companies in the organisation of brokerage services in the OTC derivatives market;
- the solicitation of clients and concluding of agreements with brokerage firms;
- certain issues relating to agreements on the provision of brokerage services on the OTC derivatives market; and
- the provision of brokerage services relating to the management of portfolios of financial instruments from the OTC derivatives market.

Comments on the draft guidelines are due by 1 February 2016. PFSA intends that the guidelines will be implemented by the market not later than by 30 June 2016.

CSSF issues circular on ex-ante contributions to the national resolution fund

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued circular (15/628) regarding information on raising 2015 ex-ante contributions to the national resolution fund according to Articles 4, 13 and 20 of the Commission Delegated Regulation on ex ante contributions to resolution financing arrangements (2015/63).

The circular is addressed to all Luxembourg established credit institutions subject to the Delegated Regulation. Luxembourg branches or foreign EU or non-EU credit institutions are not in scope of the circular and branches established in Luxembourg by a non-Luxembourg EU credit institution are covered by its head office.

Based on the sum of covered deposits as reported further to circular CSSF 15/619, the aggregate amount to be raised from the Luxembourg credit institutions in 2015 is EUR 28,550,229.

The CSSF also sent corresponding individual notices to credit institutions by 15 December 2015. The 2015 contributions are payable via bank transfer within two weeks.

The 2015 contributions received from credit institutions falling in the scope of application of Single Resolution Mechanism (SRM) Regulation (806/2014) will be transferred to the Luxembourg compartment in the Single Resolution Fund (SRF) by 31 January 2016 pursuant to Article 3(3) of the Agreement on the transfer and mutualisation of contributions to the SRF. From 2016 onwards, the contributions of these institutions will be calculated by the Single Resolution Board (SRB). In the following years, when calculating the individual contributions of each credit institution, the SRB shall take into account the 2015 contributions by deducting them from the amounts due from each credit institution.

CSSF issues circular on supplementary supervision for financial conglomerates

The CSSF has issued a circular (15/629) on supplementary supervision applicable to financial conglomerates and the definition of structure coefficients to be complied with regulated entities belonging to financial conglomerates.

The circular is addressed to all Luxembourg established credit institutions, investment firms, portfolio management companies and alternative investment fund managers and repeals CSSF circular 06/268 on supplementary supervision of financial conglomerates which became partly obsolete following the adoption of the Luxembourg law implementing the Capital Requirements Directive (CRD 4). The circular also transposes modifications made by article 2(24) of Directive 2011/89/EU to Annex I of the Financial Conglomerates Directive (2002/87/EC) in relation to capital adequacy for regulated entities in a financial conglomerate.

The circular recalls the main principles of supplementary supervision of financial conglomerates contained in articles 51-9 to 51-26 of the amended Luxembourg law of 5 April 1993 on the financial sector (FSL). It also provides details on the supplementary supervision of capital adequacy at the level of the financial conglomerate.

Credit institutions and investment firms belonging to a financial conglomerate for which the CSSF assumes the role of a coordinator, have to ensure that own funds are available at the level of the financial conglomerate, which are always at least equal to the capital adequacy requirements. The circular sets out the technical methodology and principles for calculating the supplementary requirements in terms of capital adequacy.

The circular entered into force with immediate effect.

CSSF issues circular on guaranteed deposits as of 31 December 2015

The CSSF has issued a circular (15/630) on the amount of guaranteed deposits as of 31 December 2015.

In the circular, the CSSF requests all Luxembourg incorporated credit institutions to provide information in relation to the guaranteed deposits as of 31 December 2015. The purpose of the data collection request is to enable the single resolution board (SRB) to determine the annual target level of the single resolution fund (SRF) for 2016. The purpose of the circular is identical to the purpose of the previous CSSF circular (15/619) concerning the amount of guaranteed deposits as of 31 July 2015, except that it relates to the wider context of the banking union. Credit institutions are required to include in their data guaranteed deposits with their branches established in other Member States of the European Union.

The deadline for reporting to the CSSF is 29 January 2016 in accordance with the detailed instructions annexed to the circular. The member of authorised management at the credit institution appointed as being responsible for deposit protection scheme matters must approve the information before it is reported.

CSSF publishes form for authorisation as ELTIF and authorisation to manage ELTIFs

The CSSF has published a form for the authorisation of alternative investment funds (AIFs) as European long-term investment funds (ELTIFs) and authorisation to manage an ELTIF.

The online application form must be completed and submitted to the CSSF by each Luxembourg AIF (or its representative) requesting agreement as an ELTIF in accordance with the EU Regulation on ELTIFs (2015/760), which became applicable on 9 December 2015. The scope of information and documents to be sent to the CSSF will vary depending on whether the applicant is managed by an external alternative investment fund manager (AIFM), which can be based in Luxembourg or in another European Member State, or if it is an internally managed AIF. In the latter case, the AIF must also be authorised by the CSSF as an AIFM under the AIFMD. Additional documents must also be provided by applicant AIFs other than Luxembourg regulated specialised investment funds (SIFs), investment companies in risk capital (SICARs) and undertakings for collective investment other than UCITS (Part II UCIs).

FINMA proposes digital identification for AML purposes

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on a new circular on video and online identification. The circular is intended to take into account the growth in digital technology in financial services and sets out anti-money laundering (AML) due diligence requirements that are technology-neutral in order to facilitate digital business and eliminate any unnecessary barriers.

The draft circular focuses on the onboarding of business relationships through digital channels. FINMA proposes that financial intermediaries should be able to onboard clients via video transmission if certain conditions are met. Other forms of online identification will also be possible and the circular includes several options to facilitate onboarding via the internet. A key element of the proposals would allow electronic confirmation of the authenticity of client identification documents, which will no longer require physical identification.

The consultation period runs until 18 January 2016. FINMA expects the Circular to come into effect in March 2016.

FDF consults on amendments to too-big-to-fail provisions

The Federal Department of Finance (FDF) has launched a consultation on amendments to the current too-big-to-fail provisions, which have been in force since 1 March 2012 and are subject to a review after three years.

The consultation follows a request by the Federal Council for the FDF, together with the FINMA and the Swiss

National Bank (SNB), to present proposals to implement certain recommendations on:

- recalibration of own capital requirements;
- adjustment of quality of capital;
- adjustment of certain relaxations of the capital requirements for systemically important banks;
- the timetable for implementation of Swiss contingency plan and improved global resolvability; and
- binding total loss-absorbing capacity (TLAC) requirements to complement the too-big-to-fail provisions.

The FDF proposes to adjust the going concern requirements for systematically important institutions, which consist of a basic requirement for all systemically important banks and a progressive component depending on the degree of systemic importance. The basic requirement for the leverage ratio (proportion of regulatory capital relative to unweighted total assets) will be 4.5%, and 12.9% for risk-weighted assets. Added to the expected progression based on the benchmarks, this results in going concern requirements for the two biggest banks of 5% overall for the leverage ratio and 14.3% overall for risk-weighted assets.

The FDF proposals also set out changes to gone concern requirements for systemically important banks operating internationally that would mirror the going concern ratios. The gone concern requirements for systemically important banks which do not operate internationally have yet to be developed. This will be the subject of the Federal Council's next evaluation report, which is to be adopted by the end of February 2017.

Comments on the consultation are due by 15 February 2016.

HKEx revises environmental, social and governance reporting guide in listing rules

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEx), has announced revisions to the disclosure obligation of the Environmental, Social and Governance Reporting Guide (ESG Guide), following its consultation on proposed changes in July 2015.

The changes to the ESG Guide and related listing rules include:

- requirements for issuers to state in their annual reports or ESG reports whether they have complied with comply or explain provisions set out in the ESG Guide for the relevant financial year and if they have not to give considered reasons in their ESG reports;
- providing more guidance on reporting in the introductory section of the ESG Guide and bringing it more in line with international standards;
- rearranging the ESG Guide into two subject areas dealing separately with 'environmental' and 'social';
- upgrading the general disclosures under each aspect of the ESG Guide to comply or explain and amending the wording, where relevant, to be consistent with the directors' report requirements under the Companies Ordinance; and
- changes to the wording of the voluntary provisions of the ESG Guide (i.e. the recommended disclosures) to bring it more in line with international standards of ESG reporting by incorporating disclosure of gender diversity.

Moreover, the ESG Guide will be amended so that the key performance indicators (KPIs) set out in the new 'environmental' subject area will become comply or explain provisions. The change will be effective for issuers' financial years commencing on or after 1 January 2017.

All other changes to the ESG Guide and related listing rules will come into effect for issuers' financial years commencing on or after 1 January 2016. So, for issuers with a financial year commencing 1 January, these amendments will first affect their financial year ending on 31 December 2016.

HKMA announces enhanced competency framework for banking practitioners

The Hong Kong Monetary Authority (HKMA) has announced the introduction of an industry-wide competency framework for banking practitioners to support capacity building and talent development, which will be developed with the banking industry, the Hong Kong Institute of Bankers (HKIB) and other relevant professional bodies such as the Treasury Markets Association (TMA). Under the enhanced competency framework (ECF), HKMA will introduce successive training and qualification programmes for various streams of professional work in the banking sector over the next few years, starting with anti-money laundering and counter-terrorist financing (AML/CFT), in order to raise and maintain professional competence and enlarge the talent pool, particularly at entry level.

A Steering Committee chaired by the HKMA, comprising representatives from the Hong Kong Association of Banks (HKAB) and HKIB, has been set up to advise on the development of the ECF for banking practitioners. The

HKMA will consult the industry on proposals for the ECF on AML/CFT and intends to launch the framework by the fourth quarter of 2016. HKMA will also consult the industry on similar ECFs relating to the other major functional areas which are central to the safety and soundness of authorised institutions and where talent shortages are more apparent. These are expected to include risk management, compliance and internal controls, treasury management, credit risk management and retail wealth management.

The HKIB has been tasked with developing relevant training and qualification programmes under the ECF and to act as the administrator. HKIB will also be the main external provider of the ECF training programmes and examinations.

The HKMA encourages all authorised institutions to become a corporate member of the HKIB, as a first step to contribute to the ECF initiative and keep abreast of developments relating to the qualifications framework. Although the ECF for banking practitioners is not intended to be a mandatory licensing regime, authorised institutions will be advised to adopt the ECF as the benchmark for enhancing the level of core competence and ongoing professional development of banking practitioners.

HKMA issues circular on Basel Committee guidance on credit risk and accounting for expected credit losses

The HKMA has issued a circular to all authorised institutions regarding guidance issued by the Basel Committee on Banking Supervision (BCBS) on credit risk and accounting for expected credit losses, which was published on 18 December 2015. The new guidance replaces the BCBS' earlier document on sound credit risk assessments and valuation for loans issued in 2006. The BCBS guidance, which comprises 11 principles, sets out supervisory expectations for banks on sound credit risk practices associated with implementing and applying an expected credit loss (ECL) accounting framework. The document is intended to set out guidelines on accounting for expected credit losses regardless of the applicable accounting standards.

In its circular, the HKMA highlights its view that the move to ECL accounting frameworks by accounting standard setters is an important step forward in addressing weaknesses related to credit loss recognition, which were identified during the financial crisis. As a member of the BCBS, the HKMA has announced that it intends to adopt the BCBS's guidance in the future. In the interim period, HKMA encourages all authorised institutions to review their credit risk management processes in light of the relevant principles set out in the BCBS guidance.

MAS publishes Notice on Minimum Liquid Assets and Liquidity Coverage Ratio for merchant banks

The Monetary Authority of Singapore (MAS) has published Notice 1015 on minimum liquid assets (MLA) and a liquidity coverage ratio (LCR) for merchant banks, alongside MAS' response to feedback received on the proposals in November 2015.

Among other things, the notice provides that:

- merchant banks that are domestic systemically important banks (D-SIBs) will only be required to comply with the LCR requirements. Merchant banks that are not D-SIBs may choose to comply with either the MLA or LCR requirements;
- merchant banks required to comply with the LCR requirements and not incorporated and headquartered in Singapore may, with the MAS' approval, comply with the requirements on a country-level group basis;
- merchant banks incorporated and headquartered in Singapore must maintain at all times, a Singapore Dollar LCR of at least 100% and an all currency LCR of at least 60% by 1 January 2015, with the all currency LCR requirement increasing by 10% each year to 100% by 2019;
- all other D-SIBs or merchant banks that to comply with the LCR framework are required to maintain a Singapore Dollar LCR of 100% and an all currency LCR requirement of 50% by 1 January 2017;
- merchant banks incorporated and headquartered in Singapore, or which comply with LCR on a country-level group basis, must submit group-level or country-level group level returns no later than 10 calendar days after the last day of each month and must submit entity-level returns no later than 20 calendar days after the end of each month. All other merchant banks must submit entity-level returns no later than 10 calendar days after the end of each month; and
- a merchant bank must notify the MAS in writing of its intent to utilise its MLA in a liquidity stress situation prior to the utilisation. The merchant bank should ensure that the notification is signed by its chief executive, chief financial officer or any equivalent senior management.

Notice 1015 will take effect on 1 January 2017 for all merchant banks in Singapore, although merchant banks may opt for early compliance.

AMAC publishes draft rules on private fund offering activities and draft guidelines for private fund contracts

The Asset Management Association of China (AMAC) has launched a consultation on draft measures and draft guidelines to regulate private fund offering activities in China. The draft measures include a draft questionnaire for private fund distributors to assess the potential investors' suitability for the proposed investment and a draft risk disclosure template for each investor and the fund distributor to sign. The draft guidelines include guidance for different types of fund constitutional documents, including fund contract, limited partnership agreement and articles of association, and are applicable to different types of private funds.

Comments on the draft measures and draft guidelines are due by 5 January 2016.

SSE publishes circular on stock option trading

Following the announcement of the adoption of a circuit breaker mechanism by the Shanghai Stock Exchange (SSE) on 4 December 2015, SSE has issued a circular to specify relevant matters relating to stock option trading in connection with the implementation of the circuit breaker. Among other things, the circular discusses:

- the suspension of trading in a certain stock option contract if its underlying securities are suspended from trading due to a circuit breaker;
- order submission and order cancelling during the suspension of stock option trading arising from a circuit breaker, which would still be accepted except when the suspension continues to the closing of the market; and
- the effect of the implementation of risk control measures at the same time as implementation of the circuit breaker, under which relevant trading on the SSE would be subject to SSE rules on risk control measures rather than those on the circuit breaker.

The circular took effect on 1 January 2016.

China introduces green bonds in interbank bond market

The People's Bank of China (PBoC) has announced the introduction of green bonds to allow Chinese financial institutions to raise funds for environmentally friendly projects. The funds raised through green bonds will only be able to be used to support environmental projects and a list of the permitted 'green' projects has been set out in an appendix to the PBoC's announcement.

Issuers of green bonds will be limited to:

- development banks;
- policy banks;
- commercial banks;
- financing companies within corporate groups; and
- other financial institutions.

Approval from the PBoC will be required for issuing green bonds, which may be issued by way of open tendering process or book building process and could be issued by one-off or by instalments.

The PBoC will require bond proceeds to be used solely for green projects indicated in the green bond's prospectus and a special account or ledger must be set up to ensure that fund flows are traceable.

PBoC expands RQFII regime to Thailand

The PBoC has announced the expansion of the renminbi (RMB) Qualified Foreign Institutional Investors scheme (RQFII) to Thailand with an initial investment quota of RMB 50 billion.

Thailand is the sixteenth jurisdiction to be included in the RQFII regime, in addition to Australia, Canada, Chile, France, Germany, Hong Kong, Hungary, Luxembourg, Malaysia, Qatar, Singapore, South Korea, Switzerland, United Arab Emirates and UK.

PBoC and SAFE extend trading hours on foreign exchange market and permit more qualified foreign institutions to trade

The PBoC and State Administration of Foreign Exchange (SAFE) have announced an extension to the trading hours on the foreign exchange market and that more qualified foreign institutions will be allowed to trade.

Qualified foreign institutions will be allowed to enter the interbank foreign exchange market once they have become members through the China Foreign Exchange Trade System (CFETS). To be qualified, foreign institutions must conduct the business of sales and purchases of RMB outside China. CFETS will issue detailed implementing rules. If qualified, foreign institutions may trade all the spot, forward, swap, and option transactions at the interbank foreign exchange market. In its statement, the PBoC has also clarified that foreign institutions may use the ISDA

master agreement or NAFMII master agreement for their derivatives trading.

The trading hours on the RMB foreign exchange market have been extended to 23:30. The Yuan's closing rates will be the spot price of RMB against USD quoted at 16:30.

The new trading hours came into effect on 4 January 2016.

OCC issues notice of proposed rulemaking on enforceable guidelines for recovery planning

The Office of the Comptroller of the Currency (OCC) has published a Notice of Proposed Rulemaking, which is intended to establish guidelines for recovery planning by insured national banks, insured federal savings associations, and insured federal branches of foreign banks with average total consolidated assets of USD 50 billion or more (covered banks). The guidelines are issued pursuant to a federal statute that authorizes the OCC to prescribe operational and managerial standards for national banks and federal savings associations (collectively banks), and the OCC guidelines would be enforceable under the terms of the statute. Among other things, the proposed guidelines state that a recovery plan should:

- establish triggers, which are quantitative or qualitative indicators of the risk or existence of severe stress that should always be escalated to management or the board of directors, as appropriate, for purposes of initiating a response;
- identify a wide range of credible options that a covered bank could undertake to restore financial and operational strength and viability; and
- address escalation procedures, management reports, and communication procedures.

Comments on the proposed rule are due by 16 February 2016.

FINRA submits proposed 'pay-to-play' rule to the SEC for approval

The US Financial Industry Regulatory Authority (FINRA) has filed a proposed rule (FINRA Rule 2030) with the US Securities and Exchange Commission (SEC), which would establish a 'pay-to-play' rule for FINRA members. The proposed rule is part of the SEC's continuing effort to limit placement agent activity with government entities to regulated persons (e.g., FINRA members).

The proposed provisions generally align with those in SEC Rule 206(4)-5 under the Investment Advisers Act of 1940 and would apply to FINRA member firms when:

- soliciting government entities for investments on behalf of:
  - advisers registered or required to be registered with the SEC;
  - advisers exempt from SEC registration as foreign private advisers; and
  - advisers exempt from SEC registration as exempt reporting advisers (ERAs); and
- soliciting government entities to invest in private funds managed by one of the advisers listed above, and not just to members soliciting government entities to receive more direct advice from these advisers.

The proposed rule would also prohibit covered FINRA members from engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to a government entity (whether directly or by investing in a fund) within two years after a contribution to an official of the government entity is made by the covered member or one of its covered associates.

CFTC and SFC sign MoU on cross-border regulated entities operating in the US and Hong Kong

The US Commodity Futures Trading Commission (CFTC) and the Hong Kong Securities and Futures Commission (SFC) have signed a memorandum of understanding (MoU) regarding cooperation and the exchange of information in the supervision and oversight of regulated entities that operate on a cross-border basis in the United States and Hong Kong. In the MoU, the CFTC and the SFC express their willingness to cooperate in the interest of fulfilling their respective regulatory mandates. The scope of the MoU includes markets and organised trading platforms, central counterparties, and intermediaries, dealers, and other market participants.

The MoU came into effect on 21 December 2015.

RECENT CLIFFORD CHANCE BRIEFINGS

EBA Report on Synthetic Securitisation

In the latest development in the continuing reform of securitisation in the EU, the EBA has recommended

modifications to the proposed amendments to CRR to provide for preferential regulatory capital treatment for the senior retained tranches of certain synthetic securitisations of SME exposures.

This briefing paper discusses the EBA's proposed amendments to CRR.

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

Political agreement on the EU General Data Protection Regulation – the data protection 'big-bang'

Two months after invalidation of the US Safe-Harbor by the Court of Justice of the European Union (Schrems v Data Protection Commissionner - 6 October 2015), political agreement has been reached to replace the entire EU data protection legal framework.

After four years of negotiations, representatives of the European Commission, the European Parliament and the EU Council of Ministers have finally reached agreement on the new General Data Protection Regulation (GDPR). Political agreement was reached on 15 December and the agreed text published on the following day. The LIBE Committee of the European Parliament has now also approved the text.

This briefing paper discusses the new General Data Protection Regulation which will come into force in 2018.

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

Impact of new Dutch legislation on Luxembourg holding-Dutch propco real estate holding structures

As part of the 2016 Budget, the Dutch government has prepared a number of tax proposals which, as from 2016, may affect the structuring of Dutch companies for real estate investments through a combination of Luxembourg and Dutch companies.

This briefing paper discusses the new rules.

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

Interest deductibility in leveraged acquisitions expected to be further restricted

On 21 December 2015 the Dutch Minister of Finance responded to a white paper by two members of parliament to end perceived harmful behaviour in the Dutch private equity sector. The white paper proposed changes particularly aimed at private equity investors structuring Dutch acquisitions. The response now indicates that the deductibility of interest in leveraged acquisitions will be further restricted from 1 January 2017.

This briefing paper discusses the white paper.

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

Hong Kong publishes consultation on margin requirements for uncleared OTC derivatives transactions

On 3 December 2015, the Hong Kong Monetary Authority (HKMA) published a consultation paper containing a draft module (the Margin Module) for the HKMA's Supervisory Policy Manual. The purpose of the Margin Module is to introduce margin requirements for uncleared over-the-counter (OTC) derivatives transactions for authorised institutions regulated in Hong Kong. The largest authorised institutions will need to exchange initial margin and variation margin with certain counterparties starting in September 2016, with the requirements expanding over time to cover a wide variety of market participants.

This briefing paper discusses the draft requirements.

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

Re The Protecting Americans From Tax Hikes Act of 2015

On 18 December 2015, after over a year of negotiations, Congress passed, and the President signed into law, The Protecting Americans From Tax Hikes Act of 2015. The Act extends tax provisions that expired in 2014 and makes other expiring provisions permanent. In addition, the Act makes significant changes to the rules relating to real estate investment trusts (REITs) and the rules enacted by the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) that will be relevant to both public and private REITs as well as real estate funds that are utilizing private REITs in their investment structure.

This briefing paper discusses the new Act.

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

Saudi Arabia – New Companies Law

More than a decade in the making, the new Saudi Companies Law will come into force on 2 May 2016. Its provisions will significantly impact the governance and

compliance obligations of Saudi companies, as well as how new companies will be established. It also presents new opportunities for corporate restructuring, such as via the introduction of single shareholder companies, in ways not previously possible.

This briefing paper provides an overview of the key changes introduced by the New Law and focuses in particular on the provisions applicable to joint stock companies (JSCs) and limited liability companies (LLCs), which are the most commonly-used corporate vehicles in the Saudi market for both our local and foreign clients.

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