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Briefing note

International Regulatory Update

24 – 28 October 2016

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EU Commission publishes 2017 work programme

The EU Commission has published its work programme for 2017, setting out the list of actions it will take in the coming twelve months.

The Commission intends to publish a White Paper on the Future of Europe in Q1 2017, setting out steps on how to reform an EU of 27 Member States 60 years after the Treaties of Rome, which will include the future of the Economic and Monetary Union (EMU). This initiative will also include a review of the European System of Financial Supervision (ESFS) to strengthen the effectiveness and efficiency of oversight at both macro- and micro- prudential levels.

As part of the implementation of its Capital Markets Union (CMU) Action Plan, the Commission intends to conduct a mid-term review (Q2 2017) to take stock of progress on the implementation of the CMU and identify potential additional measures required to improve the financing of the economy. New measures will include:

- a revision of the European Market Infrastructure Regulation (EMIR) (Q1 2017);
- a framework for an EU personal pension product (Q2 2017);
- an Action Plan on retail financial services (Q1 2017); and
- additional delegated legislation to facilitate funding of infrastructure corporates by institutional investors (Q4 2016).

The Commission will continue to implement the EU Action Plan on tackling terrorism financing, with proposals scheduled for Q4 2016 on harmonised sanctions to deter money laundering, illicit cash movements, illicit trade in cultural goods and the freezing and confiscation of criminals' assets.

The Commission intends to launch a Data Protection Package in Q1 2017, which will include an alignment of rules on the protection of personal data when processed by EU institutions to the new general data protection rules, a revision of the ePrivacy Directive, as well as a framework for adequacy decisions on exchange of personal data with third countries.

The Commission also intends to propose legislation in Q1 2017 to align existing acts with the Treaty provisions on delegated and implementing acts, thus phasing out the regulatory procedure with scrutiny. It will also carry out an assessment of the democratic legitimacy of existing procedures for the adoption of delegated and implementing acts and consider options for changing existing procedures for the adoption of certain secondary acts.

EMIR: EU Commission adopts Implementing Regulation on format and frequency of trade reports to trade repositories

The EU Commission has adopted an Implementing Regulation laying down implementing technical standards (ITS) with regard to the format and frequency of trade reports to trade repositories under the European Market Infrastructure Regulation (EMIR).

The Implementing Regulation, which amends Implementing Regulation (EU) No 1247/2012 and puts in place revised standards for reporting to trade repositories, will be subject to an objection period by the EU Parliament and the Council, after which it will be published in the Official Journal. The implementation of the rules will begin nine months after the entry into force of the Implementing Regulation, with the exception of the extension of the deadline for the reporting of historic trades, which will become applicable immediately upon publication of the Implementing Regulation.

CRD 4: EU Commission adopts RTS for benchmarking portfolio assessment standards and assessment sharing procedures

The EU Commission has adopted a Delegated Regulation with regard to regulatory technical standards (RTS) for benchmarking portfolio assessment standards and assessment sharing procedures under the Capital Requirements Directive (CRD 4).

Article 78 of CRD 4 requires that competent authorities assess the consistency and comparability in risk-weighted assets (RWA) produced by institutions' internal modelling approaches (except for operational risk) for which competent authorities have granted permission to be used for capital purposes.

The RTS specify the procedures for sharing the assessments between competent authorities and with the European Banking Authority (EBA) and the standards for the assessment by competent authorities of the internal approaches applied to calculating own funds for market, the internal model method (IMM), credit valuation adjustment (CVA), and credit risk.

The Delegated Regulation will enter into force on the twentieth day following that of its publication in the Official Journal.

EuSEF and EuVECA funds: EU Council publishes compromise text

The EU Council Presidency has published a compromise text on the proposal for a Regulation amending the Regulation on European venture capital funds (EuVECA) and the Regulation on European social entrepreneurship funds (EuSEF).

MiFIR: ESMA publishes reporting instructions

The European Securities and Markets Authority (ESMA) has published reporting introductions and XML schemas under its Financial Instruments Reference Data System (FIRDS), which covers requirements under MiFIR and the Market Abuse Regulation (MAR) for reference data collection and publication, collection and processing of additional data to support the MiFIR transparency regime and suspensions's coordination.

Alongside various XML scheme, ESMA has published reporting instructions on:

- MiFIR transaction reporting;
- the FIRDS reference data system;
- the double volume cap system;
- the FIRDS transparency system.

EBA and ESMA jointly consult on management body suitability guidelines

The European Banking Authority (EBA) and ESMA have launched a consultation on proposed new guidelines for assessing the suitability of management bodies and key function holders. The draft guidelines are intended to standardise suitability assessments and to ensure EU financial institutions have sound governance arrangements in accordance with CRD 4 and MiFID2.

The proposed guidelines set out:

- criteria to be used to assess the knowledge, skills, experience, reputation, integrity and independence of mind of members of the management body;
- a framework for assessing the time commitment expected of members;
- clarifications with respect to how directorships are to be counted to ensure compliance with CRD 4;
- how diversity should be taken into account during the recruitment of members to the management body; and
- requirements for institutions to establish training policies and allocate sufficient financial and human resources to induction and training.

Comments on the consultation are due by 28 January 2017.

CRR: EBA reports on review of large exposures regime

The EBA has published its response to the EU Commission call for advice on the review of the large exposures framework set out in the Capital Requirements Regulation (CRR).

The report analyses the impact of aligning certain aspects of the EU large exposures regime with the standards on large exposures produced by the Basel Committee on Banking Supervision (BCBS). The EBA argues in favour of including only Tier 1 capital instead of allowing also a proportion of Tier 2 capital, as it is currently the case, to help strengthen the large exposures capital base.

The report also deals with exemptions identified in the call for advice, which might currently be used by institutions subject to the discretion of competent authorities or Member States. The report recommends removing three of the five exemptions and, more generally, highlights the importance of reducing exemptions and discretions to further align with the BCBS standards and achieve consistency across jurisdictions.

Finally, the report considers further alignment to the BCBS standards where possible and identifies other issues that require further work.

MREL: EBA consults on draft ITS on transmission of information by resolution authorities

The EBA has launched a consultation on draft ITS on procedures for the identification and transmission of

information by resolution authorities to the EBA on the minimum requirement for own funds and liabilities eligible for bail-in (MREL) under the Bank Recovery and Resolution Directive (BRRD). MREL is to be set on a firm-by-firm basis, based on criteria laid down in the BRRD and the RTS on MREL.

The consultation covers the reporting of MREL requirements from resolution authorities to the EBA. Reporting by institutions to resolution or competent authorities falls outside of the consultation's scope. The consultation sets out proposals on templates for reporting the overall amount of MREL required from an institution, as well as each of the components of the MREL decision as foreseen in RTS on MREL. The proposed template is contained in an annex to the consultation.

Comments on the consultation are due by 21 November 2016.

IOSCO reports on implementation of G20/FSB securities-related recommendations

The International Organization of Securities Commissions (IOSCO) has published a report on the implementation of the G20/FSB post-crisis recommendations aimed at strengthening securities markets. For the survey, IOSCO coordinated with the Financial Stability Board (FSB) to analyse securities-related recommendations and followed up with IOSCO members in FSB jurisdictions.

The report relates to five reform areas:

- hedge funds;
- structured products and securitisation;
- oversight of credit rating agencies (CRAs);
- measures to safeguard the efficiency and integrity of markets; and
- supervision and regulation of commodity derivative markets.

The FSB published a high-level summary of jurisdictions' implementation status in other areas following the G20 Leaders Summit in September 2016, this report is intended to provide additional insights and analysis.

Overall, the report has identified that most responding jurisdictions have taken steps to implement the G20/FSB recommendations and IOSCO guidance in each reform area, with particularly advanced implementation in relation to hedge funds, structured products and CRAs.

FCA consults on future mission statement

The Financial Conduct Authority (FCA) has launched a consultation on the FCA's future mission, which is intended to provide clarity over the FCA's objectives, its methods and reasoning for the work it does and tools it chooses to use.

The document sets out details of the way in which the FCA makes its regulatory choices against a number of critical areas in the context of its overriding strategic objective set by Parliament to ensure that relevant markets function well, as well as consumer protection, protecting the integrity of UK markets and enhancing competition.

The key themes the FCA is consulting on are:

- consumer protection and vulnerable consumers;
- delivering consumer redress;
- identifying harm and the decision to intervene;
- the scope of regulation and unregulated activities;
- interaction between regulation and public policy;
- competition, supervision and enforcement; and
- a proposed review of the FCA Handbook.

Comments on the consultation are due by 26 January 2017.

EMIR: FCA agrees MoU with CFTC on the exchange of information

The FCA has concluded a memorandum of understanding (MoU) with the Commodity Futures Trading Commission (CFTC). The MoU covers the cooperation and exchange of information in the supervision and oversight of firms who trade in certain OTC derivatives on a cross-border basis in both the United States and the United Kingdom.

The MoU was signed on 6 October 2016.

MiFID2: PRA publishes policy statement on passporting and algorithmic trading

The Prudential Regulation Authority (PRA) has published a policy statement (PS29/16) on Part 1 of its implementation of MiFID2. The policy statement sets out final rules to transpose the MiFID2 rules on passporting and systems and controls with respect to algorithmic trading into the PRA Rulebook.

The policy statement sets out feedback on the consultation (CP9/16), which was launched in March 2016, and the final rules in the Passporting Part and new Algorithmic Trading Part of the PRA Rulebook. The PRA has made certain minor amendments to its proposals including clarifications but has not made any significant changes based on the

feedback received. The rules have been made based on draft regulatory technical standards (RTS) adopted by the EU Commission and the PRA will insert the instruments set out in an annex to the policy statement and commence the rules once the RTS have been confirmed. The policy statement will be updated at that point with the finalised instruments and the PRA may also make further changes to give effect to the text of the final RTS.

The policy statement is relevant to banks, building societies, PRA-designated investment firms and their qualifying parent undertakings, which for this purpose comprise financial holding companies and mixed financial holding companies, as well as credit institutions, investment firms and financial institutions that are subsidiaries of these firms.

Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2016 made

The Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2016 (SI 2016/1032) has been made. The Order makes a number of technical amendments to the UK's bank ring-fencing regime, which is due to come into force on 1 January 2019 under the Financial Services (Banking Reform) Act 2013 and related secondary legislation.

HM Treasury intends that the Order will address certain technical issues that could potentially undermine the effectiveness of the ring-fencing regime, which have been identified as banks begin to implement required structural changes. The Order makes a number of amendments to the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 to address technical issues and to help facilitate an effective and timely implementation of ring-fencing.

The Order comes into force on 1 December 2016.

CSSF issues circular on scope of deposit guarantee and investor compensation and launches survey on covered claims in connection with investment business

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), acting in its function as depositor and investor protection council (conseil de protection des déposants et des investisseurs) (CPDI), has issued Circular 16/02 on the scope of the deposit guarantee and investor compensation.

The circular is addressed to all credit institutions and investment firms incorporated under Luxembourg law, to the Entreprise des Postes et Télécommunications, to the Luxembourg branches of non-EU credit institutions and investment firms, as well as to UCITS management companies and to alternative investment fund managers whose authorisation includes the management of portfolios on a discretionary, client-by-client basis.

The circular is intended to clarify certain eligibility criteria with respect to the deposit guarantee and investor compensation, in accordance with Titles II and III of the amended law of 18 December 2015 on the failure of credit institutions and certain investment firms. The circular further reiterates the exclusions from the deposit protection scheme defined in the outdated Circular CSSF 15/630 and extends them to the Luxembourg investor compensation scheme.

The CSSF has also issued Circular 16/03 to conduct a survey on covered claims in connection with investment business. The circular is addressed to all credit institutions and investment firms incorporated under Luxembourg law, to the Luxembourg branches of non-EU credit institutions and investment firms, as well as to UCITS management companies and to alternative investment fund managers whose authorisation includes the management of portfolios on a discretionary, client-by-client basis.

Pursuant to the amended Luxembourg law of 18 December 2015 on the failure of credit institutions and certain investment firms (2015 Law), the CPDI has to request data from the members of the Système d'indemnisation des investisseurs Luxembourg (SIIL) for the purpose of calculating the share of the contribution that each member would have to make in accordance with the BRRD Law, should a compensation by the SIIL happen.

The data survey aims to collect the volume of covered claims (instruments and money) in relation to investment business of which members are debtors, in accordance with Article 198(1) of the 2015 Law.

The amounts of covered claims need to be reported based on the figures as at 31 December 2015. To this end, members are requested to complete one of the sheets (simplified or detailed) of the document available on the CSSF's website and transmit the completed document no later than 15 November 2016.

CSSF issues regulation on ex-ante contributions to national resolution fund

The CSSF has issued Regulation 16-06 dated 28 September 2016 on ex ante contributions to be paid to the

Luxembourg Resolution Fund (Fonds de Résolution Luxembourg).

The Regulation, published in the Luxembourg official journal on 10 October 2016, sets out the annual contributions to be collected from the relevant entities falling under its scope for 2015 and 2016. The Regulation provides further clarification with regard to, amongst other things, the impact of a change in the regulatory or legal status of such entities during the course of the contribution period on their due annual contributions.

The Regulation entered into force four days after its publication in the Luxembourg official journal.

Polish Council of Ministers adopts bill amending Act on Trading in Financial Instruments and Certain Other Acts

The Polish Council of Ministers has adopted a bill on the amendment of the Act on Trading in Financial Instruments and Certain Other Acts. The most important changes provided for by the amendment are:

- the abolition of the division of the regulated market into the stock exchange market and the OTC exchange market and covering both types of the mentioned markets with the same notion – of a regulated market;
- the introduction of the institution of a derivatives account;
- the change of the authority issuing permits for operating a regulated market – from the Minister of Development and Finance to the Polish Financial Supervision Authority.

The bill has been submitted to the Sejm.

Sejm adopts amendment to Act on Payment Services

The Sejm has adopted an Amendment to the Act on Payment Services and Certain Other Acts, which contains solutions aimed at increasing the security of payment services and developing the national payment card system. The Act adapts the national regulations concerning payment transactions carried out with the use of payment cards to the EU provisions (the MIF Regulation). Moreover, the amendment implements the Directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (the PAD). The aim of the amendments adopted is also to facilitate the possibility of comparing fees and services within the scope of payment accounts and to regulate the issue of internet websites that compare the offers of particular financial services providers.

The Act has been passed to the Senate.

Polish Financial Supervision Authority appoints new Chairman

Marek Chrzanowski has been appointed the Chair of the Polish Financial Supervision Authority as of 13 October 2016. Mr. Chrzanowski has previously been coordinator of the 'Economy, Employment, Enterprise' section on the National Development Council set up by Polish President and from 13 January 2016 to 6 October 2016, he was a member of the Monetary Policy Council.

State Council sets out plan to enhance regulation of internet finance

The State Council General Office has published the 'Circular on the Implementation Plan of A Special Remediation Campaign Addressing Risks Associated with Internet Finance (12 April 2016)', which is intended to launch a nationwide campaign to deal with non-compliance in the internet finance sector. The Circular is intended to further implement the 'Guiding Opinions on Promoting the Healthy Development of Internet Finance' issued in 2015.

In particular, the following aspects are worth noting:

- key areas under the Circular include P2P online lending, equity crowd-funding, internet asset management and cross-sector internet financial business, third-party payment, and advertisement in the field of internet finance;
- a central leadership group headed by the responsible governor from the People's Bank of China and provincial level local leadership groups have been established under the Circular. The Circular also clarifies the function of each governmental authority involved;
- the Circular requires the adoption of a 'look-through' approach to determine if any internet business activity triggers financial licensing requirements (i.e. by assessing the corresponding financial service nature based on a business activity's substance); and
- the Circular calls for strengthening the market entry administration, enhancing client money protection, establishing a whistle-blowing mechanism (with material awards and penalties), correcting unfair competition behaviours, improving internal controls and better utilising technologies.

The relevant financial regulators have also issued the respective work plan in each area based on the task allocation set out in the Circular.

HKEX to roll out volatility control mechanism for derivatives market

Hong Kong Exchanges and Clearing Limited (HKEX) has announced plans to roll out its Volatility Control Mechanism (VCM) – a measure designed to protect market integrity by preventing extreme price volatility arising from major trading errors and other unusual incidents – for its derivatives market on 14 November 2016. HKEX's securities market has had its VCM since 22 August 2016.

HKEX proposed the VCM in a consultation paper after the G20 and the International Organization of Securities Commissions (IOSCO) issued guidance on implementing control mechanisms in trading venues to deal with systemic risks arising from volatile market situations. Based on the consultation feedback, HKEX has decided to proceed with implementation of the VCM after concluding that there was substantial market support for its proposal.

SFC issues advisory circular on client identity verification in account opening process

Further to its circular concerning know your client and account opening procedures issued on 12 May 2015, the Securities and Futures Commission (SFC) has issued an advisory circular to provide more guidance to the industry on compliance with the regulatory requirements on account opening.

The circular notes that client identity verification is an essential element of an effective customer due diligence process which intermediaries need to put in place to guard against reputational, operational, legal and financial risks. The requirements on account opening are set out in paragraph 5.1 of the Code of Conduct for Persons Licensed by or Registered with the SFC, which requires intermediaries to take all reasonable steps to establish the true and full identity of each of their clients. In a face-to-face situation, the signing of the account opening documents (e.g. client agreement) and the sighting of the identity documents can be performed in the presence of an employee of the intermediary.

In a non-face-to-face situation where a client is not physically present, intermediaries will generally not be able to determine the identity documents provided to them belong to the client. Paragraph 5.1 of the Code of Conduct provides specific guidelines to intermediaries on acceptable approaches in performing the client identity verification which could apply to the situation where onboarding of clients is conducted online (A summary is provided in the Appendix of the circular).

Based on its study and feedback from the industry, the SFC considers the requirements set out in the Code of Conduct are adequate and on par with international standards. However, the SFC circular provides further guidance on how the following three approaches set out in paragraph 5.1 are applied in a non-face-to-face situation in today's environment:

- certification services provided by certification authorities;
- client identity verification through professional persons or affiliates; and
- client identity verification by provision of client agreements, identity documents and drawing on a Hong Kong bank account.

The SFC has indicated that it will monitor technology development and continue to communicate with the industry on any suggestions regarding the use of technology for reliable and effective client identity verification for account opening purposes.

JFSA recognises equivalence of US-CFTC and Canadian margin regulations

The Financial Services Agency of Japan (JFSA) has finalised a notice designating the US-CFTC and Canadian (Office of the Superintendent of Financial Institutions) margin regulations as being equivalent to the JFSA margin regulations. The JFSA margin regulations came into effect on 1 September 2016 and contains a provision allowing for substitute compliance for overseas margin regulations that the JFSA considers to be equivalent to the JFSA margin regulations. The US-CFTC and Canadian margin regulations are the first overseas margin regulations to be recognised as being equivalent.

Substitute compliance is only possible when:

- such alternative overseas margin regulations apply to specified transactions; and
- the relevant overseas supervisory authority exercises appropriate supervision over at least one of the parties involved in such specified transactions.

A party can comply with one jurisdiction's regulations regarding initial margin and another jurisdiction's regulations regarding variation margin.

The JFSA has announced that it intends to further recognise other jurisdictions' margin regulations as being designated overseas margin regulations once the JFSA confirms their equivalence but no timeframe has been disclosed.

Singapore Government consults on restructuring framework and re- domiciliation of companies under Companies (Amendment) Bill

The Ministry of Law (MinLaw) has launched a consultation on proposed amendments to the Companies Act (Cap. 50) to reform Singapore's debt restructuring and corporate rescue framework. Due to the complexity and volume of legislative amendments required, MinLaw intends to take a phased approach to implementation.

A key change proposed is the inclusion of a new set of provisions in the Companies (Amendment) Bill to support creditor schemes of arrangements that implement debt restructuring proposals, including provisions on:

- rescue finance in order that the Court can grant new financing, which is provided to assist the restructuring, priority over the creditor claims;
- cram-down, to allow a scheme to be approved even if a class of creditors oppose the scheme, if such creditors will not be unfairly prejudiced by the scheme;
- pre-packs;
- cross-border insolvency, including the adoption of the UNICITRAL Model Law on Cross-Border Insolvency; and
- enhanced creditor protection by including debtor disclosure requirements and safeguarding against debtors dissipating assets during a moratorium.

Other proposed changes include:

- amendments to enable companies to apply for a judicial management order more easily and to provide for rescue financing in judicial management; and
- reforms to facilitate the resolution of cross-border insolvencies, such as the adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency and the abolition of the general ring-fencing rule in the winding up of foreign companies.

Comments on the consultation are due by 2 December 2016.

Separately, the Ministry of Finance (MOF) and the Accounting and Corporate Regulatory Authority of Singapore are concurrently seeking public feedback on proposed amendments to the Companies Act to introduce an inward re-domiciliation regime in Singapore. Re-domiciliation is a process whereby a corporation transfers its registration from its home jurisdiction to another jurisdiction. A corporation may choose to re-domicile for regulatory, strategic or organisational reasons, while retaining its identity and history in the various regulatory jurisdictions it has presence in, and minimising operational disruptions.

Under the proposed regime, an inbound corporation which is re-domiciled to Singapore would become a Singapore company and would be required to comply with the requirements of the Companies Act. Comments on the consultation paper are due by 16 November 2016.

Singapore and Korea sign cooperation agreement on FinTech

The Monetary Authority of Singapore (MAS) and the Korean Financial Services Commission (KFSC) have signed a cooperation agreement on fintech, which sets out a joint framework. Under the agreement, the MAS and the KFSC will explore potential joint innovation projects on technologies such as big data and mobile payments. The MAS and the KFSC will also discuss issues of common interest, and share information on fintech trends and how they may impact existing regulations.

RECENT CLIFFORD CHANCE BRIEFINGS

The UK's future trade relationships

Post-Brexit, there is likely to be a bespoke relationship between the UK and the EU, which is likely to be based in form on a Free Trade Agreement (FTA). To recreate something akin to the UK's current global network of preferential trade agreements, the UK will also need to negotiate FTAs with its other key trading partners.

This briefing paper discusses some of the key issues and challenges ahead as the UK negotiates its future trade relationships.

https://www.cliffordchance.com/briefings/2016/10/the_uk_s_future_traderelationships.html

Criminal Finances Bill – UK Government presses ahead with financial crime reforms

On 14 October, the UK Government introduced the Criminal Finances Bill to Parliament. This draft legislation proposes the introduction of a new offence of failing to prevent the facilitation of tax evasion as well as changes to certain aspects of the anti-money laundering (AML) and counter terrorism financing (CTF) framework. Although the precise shape and impact of the proposed new measures will evolve as the Bill progresses through Parliament, it is

clear that they will affect the way in which banks will have to approach financial crime compliance, work with one another to share information and report suspicions.

This briefing paper examines the key measures proposed (and those which the Government has decided not to progress at this stage). It looks at how they fit into the current enforcement landscape and how they may presage other important financial crime measures in the UK.

https://www.cliffordchance.com/briefings/2016/10/criminal_financesbillukgovernmentpresse.html

Brexit comment in the High Court moves the market

The case of R (on the application of Miller) v Secretary of State for Exiting the European Union is a major constitutional test case, which has had the unexpected consequence of a comment made by the Government's lawyer causing sterling to rise on the foreign exchange markets.

This briefing paper discusses the case.

https://www.cliffordchance.com/briefings/2016/10/brexit_comment_inthehighcourtmovesthemarket.html

Federal Banking Agencies Consider Tough Cybersecurity Regulations

On 19 October 2016, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency issued an advanced notice of proposed rulemaking that would establish enhanced cyber security standards. The Proposed Rules would apply to large institutions subject to the Agencies' jurisdiction, including US bank holding companies with total consolidated assets of USD 50 billion or more, banks with total consolidated assets of USD 50 billion or more; the US operations of foreign banking organizations with total US assets of USD 50 billion or more, and nonbank financial companies supervised by the Federal Reserve pursuant to section 165 of the Dodd-Frank Act.

This briefing paper discusses the proposed standards.

https://www.cliffordchance.com/briefings/2016/10/federal_banking_agenciesconsidertoug.html