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Briefing note

International Regulatory Update

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- Recent Clifford Chance briefings: 'Snowball' swaps; Legal advice privilege; and more. Follow this link to the briefings section.

EMIR: Delegated Regulation on risk-mitigation techniques for OTC derivative contracts published in Official Journal

Commission Delegated Regulation (EU) 2016/2251 with regard to regulatory technical standards (RTS) for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (CCP) has been published in the Official Journal.

The Delegated Regulation sets out the levels and types of collateral that OTC derivatives counterparties must exchange bilaterally if the transaction is not cleared through a CCP. The margin collected will protect the non-defaulting counterparty against resulting losses should one counterparty to the transaction default.

The Delegated Regulation will enter into force on 4 January 2017.

Exposures to CCPs: Implementing Regulation extending transitional periods for own funds requirements published in Official Journal

A Commission Implementing Regulation to extend the transitional periods related to own funds requirements for exposures to CCPs under the Capital Requirements Regulation (CRR) and the European Market Infrastructure Regulation (EMIR) has been published in the Official Journal.

The CRR provides for a transition period before higher own funds requirements are applied to ensure a level playing field for all EU CCPs while the process of authorisation and recognition takes place. While the authorisation process for existing CCPs has been completed, there are several CCPs established in third countries which have applied for recognition but have not yet received it. As the recognition process for these third-country CCPs will not be completed by 15 December 2016, when the transitional period was set to expire, the Commission Implementing Regulation extends the transitional period for a further six months until 15 June 2017.

The Implementing Regulation entered into force on 13 December 2016.

EMIR: EU Commission adopts equivalence decisions for CCPs and trading venues in non-EU jurisdictions

The EU Commission has adopted equivalence decisions on CCPs and trading venues in ten non-EU jurisdictions. The Commission has determined that India, Brazil, New Zealand, Japan Commodities, United Arab Emirates and Dubai International Financial Centre have equivalent regulatory regimes for CCPs to the EU.

The Commission has also determined that the rules governing certain financial markets in Australia, Canada, Japan and Singapore can be deemed equivalent to those in the EU.

Non-EU CCPs wishing to obtain recognition must submit a complete application to the European Securities and Markets Authority (ESMA), who will then process the application in cooperation with the relevant regulators of the CCP that has applied for recognition.

Transactions executed in recognised financial markets are no longer considered OTC under EMIR.

Capital Markets Union: EU Council agrees negotiating stance on EuSEF and EuVECA funds

The Permanent Representatives Committee (COREPER) has, on behalf of the EU Council, agreed its negotiating stance on the proposed regulation amending the regulation on European venture capital (EuVECA) funds and European social entrepreneurship (EuSEF) funds. COREPER has invited the incoming Maltese Presidency to begin negotiations with the Parliament with a view to reaching an agreement at first reading.

Meanwhile, the EU Parliament's Economic and Monetary Affairs Committee (ECON) has published its draft report on the proposed regulation.

Anti-Money Laundering: EU Council Presidency publishes compromise text

The EU Council Presidency has published a fourth compromise text for the proposed Directive amending the fourth Anti-Money Laundering Directive (AMLD 4).

EMIR: ESMA consults on extending aggregated trade repository data

The European Securities and Markets Authority (ESMA) has launched a consultation on the extension of data available to the public in trade repositories (TRs) as stipulated in EMIR.

Under Article 81 of EMIR, ESMA is required to develop draft regulatory technical standards (RTS) specifying the frequency and the details of the information to be made available to the relevant authorities and the information to be published by trade repositories.

ESMA is setting out proposals to enhance the data made publicly available by TRs and to increase transparency to the public in general as well as allowing the publication of certain figures required by EU regulations such as MiFID2 and the Benchmarks Regulation.

ESMA's proposals relate to:

- the avoidance of double counting of cleared derivatives;
- data aggregation for commodity derivatives and derivatives using benchmarks; and
- general technical aspects of publication of aggregate data.

Comments to the consultation close 15 February 2017.

Credit rating agencies: ESMA publishes annual market share calculation

ESMA has published its annual market share calculation for EU registered credit rating agencies (CRAs). The market share calculation, which is required under Article 8d of the Credit Rating Agencies Regulation (CRA Regulation), aims to promote competition in the credit rating industry by encouraging issuers and related third parties to appoint smaller CRAs. The market share calculation also aims to increase awareness of the different types of credit ratings offered by each registered CRA.

MREL: EBA publishes final report

The European Banking Authority (EBA) has published its final report on the implementation and design of the minimum requirement for own funds and eligible liabilities (MREL). The report, which has been prepared under a mandate contained in the Bank Recovery and Resolution Directive (BRRD) and is addressed to the EU Commission, makes a number of recommendations aimed at improving the EU MREL framework to best deliver on the main objectives of the bank resolution reform. Publication of the report follows an interim version that the EBA provided to the Commission and published for public consultation on 19 July 2016 and reflects comments received from stakeholders on the interim report alongside the final conclusions and recommendations.

Among other things, the EBA supports the link between MREL and capital requirements and has concluded that this would be better achieved if both requirements used risk-weighted assets (RWAs) with a leverage ratio exposure backstop requirement as a consistent denominator. The EBA also recommends:

- respecting the minimum qualitative requirements laid down in the Financial Stability Board (FSB) TLAC term sheet for global systemically important banks (G-SIBs) as well as delivering a resolution strategy for each firm and, for G-SIBs, set MREL as the higher of minimum qualitative requirements and the amount necessary to meet the resolution strategy of any specific firm;
- introducing mandatory subordination requirements of at last 14.5% RWAs for G-SIBs, in line with the TLAC term sheet, and 13.5% (with some flexibility) for other systemically important banks (O-SIIs); and
- enhancing transparency to support market discipline and facilitate the emergence of a market for MREL instruments.

EBA publishes final guidelines on revised Pillar 3 disclosure requirements

The EBA has published its final guidelines on regulatory disclosure requirements following an update of the Basel framework's Pillar 3 requirements in January 2015. The guidelines, which apply to globally and other systemically important institutions (G-SIIs and O-SIIs), are intended to provide further guidance and support to institutions in complying with the regulatory disclosure requirements in the revised version of the Pillar 3 framework (RPF), under Part Eight of the Capital Requirements Regulation (CRR). They cover all of the RPF, with the exception of securitisation requirements (which are currently under discussion following the finalisation of a revised international securitisation framework) and those disclosure requirements for which there are already EBA Delegated or Implementing Regulations or guidelines.

The guidelines apply from 31 December 2017, but G-SIIs are encouraged to comply with a subset of the guidelines from 31 December 2016.

PSD2: EBA publishes final draft RTS on passport notifications

The EBA has published its final draft regulatory technical standards (RTS) on the cooperation and exchange of information for passporting under the recast Payment Services Directive (PSD2).

The final draft RTS are intended to ensure the consistent exchange of information between national authorities of the home and host Member States of payment institutions and e-money institutions that carry out business in multiple EU Member States. The EBA consulted on draft RTS in December 2015 and in response to the feedback received the EBA has made certain changes to the final draft RTS in order to provide clarity on the use of templates for the use of an agent or distributor and to enhance the transparency of passport notifications.

FSB consults on guidance on implementation of resolution standards

The Financial Stability Board (FSB) has published two consultation papers seeking feedback on proposed guidance to support resolution planning and promote resolvability.

The FSB's first consultation seeks feedback on guiding principles to support the implementation of the internal total loss-absorbing capacity (TLAC) of global systemically important banks (G-SIBs).

The TLAC standard has been designed so that failing G-SIBs will have sufficient loss-absorbing and recapitalisation capacity available in resolution for authorities to implement an orderly resolution that minimises impacts on financial stability, maintains the continuity of critical functions, and avoids exposing public funds to loss.

The FSB agreed to undertake work on the implementation of the requirement for internal TLAC, the loss-absorbing resources that resolution entities commit to material subsidiaries.

The consultation proposes principles covering:

- the process for identifying material sub-groups;
- considerations relating to the determination of the size of the internal TLAC requirement, its composition and the trigger mechanism; and
- cooperation and coordination between G-SIB home and key host authorities.

The second consultation sets out the FSB's proposed arrangements to support continued access to financial market infrastructures (FMIs) by a firm in resolution. To maintain continuity of critical functions in resolution, it is necessary to ensure the parallel continuity of the services that underpin them, including those provided by FMIs. The FSB's proposed guidance seeks to address the risk of a bank in resolution being unable to maintain access to the clearing, payment, settlement and custody services provided by FMIs that are necessary to continue the provision of a firm's critical functions in resolution.

Comments to both consultations close 10 February 2017.

MiFID2: FCA publishes fourth consultation paper

The Financial Conduct Authority (FCA) has launched its final consultation (CP16/43) on the implementation of MiFID2. The consultation is relevant to a broad range of organisations and proposes broadly technical changes in relation to:

- conduct of business regimes under COBS 18 for specialist types of designated investment business;
- technical changes to the tied agents regime under FCA rules on appointed representatives (ARs);
- SME growth markets;
- market data, including proposed guidance on the scope of the approved reporting mechanism (ARM) regime, certain aspects of the use of ARMs and the data reporting service providers (DRSPs) regime; and

- other miscellaneous changes to the Perimeter Guidance, clarification of the territorial scope of rules on remuneration and training and competency, and amendments to BCOBS to reflect the proposals set out in the FCA's third consultation (CP16/29) on structured deposits, as well as feedback on changes to Form A consulted on in CP16/29.

Comments on these parts of the consultation are due by 17 February 2017.

The FCA is also consulting on transitional rules on fees, which would begin when the FCA starts accepting applications for authorisations relating to the changes in MiFID2 and the point at which legislative changes take effect to enable the FCA to collect fees for the changes of scope. Comments on the proposed fees rules are due by 16 January 2017.

EU Member States have until 3 July 2017 to bring laws and regulations into line with MiFID2, which applies from 3 January 2018. The FCA expects to publish two policy statements on its rules under MiFID2 which it intends to publish in March and June 2017.

FCA consults on future funding, scope and operation of FSCS

The FCA has launched a consultation on proposed changes to the funding of the Financial Services Compensation Scheme (FSCS), as well as to rules affecting the scheme's scope and operation. Amongst other things, the proposed changes are intended to ensure that the FSCS levies are more predictable and that the responsibility for compensation claims is more evenly spread amongst firms.

The FCA is seeking feedback on the following options for changing the funding for the FSCS and the coverage it provides to consumers:

- requesting feedback on the professional indemnity insurance (PII) market and its coverage;
- introducing product provider contributions towards the cost of claims involving intermediary firm failures;
- changing the FSCS funding classes for intermediation activities;
- exploring the potential for FSCS levies to better reflect the risks posed by specific practices; and
- updating limits on consumer coverage following the introduction of the pension freedoms.

The FCA is also consulting on proposed changes to rules affecting the FSCS' scope and operation, including:

- extending coverage for some aspects of fund management;
- introducing FSCS coverage for debt management firms and structured deposit intermediation;
- adding further reporting requirements;
- ensuring that FCA rules include Lloyd's of London appropriately, in circumstances where they could be called on to contribute; and
- amending payment arrangements so that firms may be asked to pay a proportion of the levy on account.

Comments are due by 31 March 2017.

PRA consults on reporting requirements under IFRS 9 alongside other regulatory reporting publications

The Prudential Regulation Authority (PRA) has published a number of documents on regulatory reporting for the banking sector.

The PRA is consulting (CP46/16) on proposed changes to regulatory reporting requirements for banks and building societies using IFRS 9 from 1 January 2018. The PRA proposes that firms using IFRS 9 in its endorsed form or as part of UK generally accepted accounting principles (GAAP) should report using certain European Banking Authority (EBA) financial reporting (FINREP) templates instead of the current FSA015 return. The PRA is also proposing that certain firms that do not apply IFRS 9 should also use some FINREP templates to ensure consistent data for peer analysis.

Alongside the consultation, the PRA has published two policy statements and updated supervisory statements:

- Policy Statement PS36/16 sets out feedback to Chapter 3 of the PRA consultation on regulatory reporting of financial statements, forecast capital data and IFRS 9 requirements (CP17/16), which was published in April 2016. The policy statement sets out feedback and final rules in relation to balance sheet and profit or loss (P&L) data as well as an update to the supervisory statement on guidelines for completing regulatory reports (SS34/15); and
- Policy Statement PS35/16 sets out feedback to the PRA's occasional consultation paper (CP26/16) published in July 2016 and final rules in the following PRA Rulebook parts:
  - Internal Liquidity Adequacy Assessment Part;

- Conditions Governing Business Part;
- Regulatory Reporting Part; and
- Capital Buffers Part and Leverage Ratio Part.

The Policy Statement also sets out an update to the PRA Supervisory Statement on its approach to supervising liquidity and funding risks (SS24/15).

The PRA has also launched a joint consultation with the Financial Conduct Authority (FCA) (PRA CP45/16 and FCA CP 16/41) on proposed amendments to the notes to the mortgage lenders and administrators return (MLAR), which relates to both the PRA's notes and those found in the Supervision Manual (SUP) of the FCA Handbook as well as form MLA-D1. The proposed amendments are not intended to result in any additional reporting requirements but reflect the transposition of the Mortgage Credit Directive (2014/17/EU - MCD) in the UK in March 2016.

Comments on both consultations are due by 13 March 2017.

BaFin suspends its intended prohibition of distribution of credit linked notes to retail clients

On 26 July 2016, the German Federal Financial Supervisory Authority (BaFin) announced its intention to ban the distribution of credit linked notes to retail clients.

The German Banking Industry Committee (Deutsche Kreditwirtschaft, DK) and the German Derivatives Association (Deutsche Derivate Verband, DDV) reacted by presenting a self-commitment for the issue and distribution of credit-linked notes in the form of ten principles. Amongst other things, only simply structured credit-linked notes are to be issued for distribution to retail clients in Germany. In addition, credit-linked notes need to be issued with a minimum denomination of EUR 10,000.

As a consequence, BaFin has suspended its planned ban for a period of six months and will examine whether the package of proposed measures is effective.

BaFin delays amendment of remuneration ordinance for institutions until March 2017

BaFin has announced that it is delaying the entry into force of the amended remuneration ordinance for institutions (Institutsvergütungsverordnung) until 1 March 2017. This will enable BaFin to consider the changes to the CRD 4 framework.

Second ordinance amending reporting ordinance published in Federal Law Gazette

On 5 December 2016, the German Federal Financial Supervisory Authority (BaFin) adopted the second ordinance amending the reporting ordinance (Anzeigenverordnung), which has now been published in the Federal Law Gazette (Bundesgesetzblatt).

The changes are mainly driven by amendments to the German Banking Act (Kreditwesengesetz) due to the incorporation of Capital Requirements Regulation (CRR) and Directive (CRD 4) and Single Supervisory Mechanism (SSM) related regulations. One of the important amendments is the requirement to use the Legal Entity Identifier (LEI) (Rechtsträgerkennung) for reporting purposes. The LEI must be issued by an internationally recognised regulatory authority.

Further changes concern the appointment of managing directors and members of the supervisory board. In particular, the new sections 5a to 5f now contain detailed specifications as to the required documents and the new section 10a provides for further reporting obligations for managing directors and members of the supervisory board of a significant CRR institution.

Spanish National Securities Market Commission announces Brexit welcome programme

The Spanish National Securities Market Commission (CNMV) has announced that it is ready to welcome United Kingdom-based financial institutions that wish to locate their business in Spain as a result of Brexit.

The CNMV has announced that it will:

- implement a welcome programme for investment and management firms based in the United Kingdom (including, among other things, a fast-track authorisation process and accepting documentation in English);
- be able to efficiently approve and supervise current internal models for the determination of capital needs to cover counterparty and market risks (this will also include a fast-track authorisation procedure);
- adopt the most flexible approach to the outsourcing of functions provided that the relevant Spanish entity is not a totally empty shell and the outsourcing scheme complies with MiFID requirements; and
- not impose additional requirements beyond those derived from EU legislation in other important areas

(such as recovery and resolution, remuneration policies or transparency, among others).

Other entities not moving from the United Kingdom could also benefit from these measures.

Amendment to Polish Act on Payment Services published in Journal of Laws

The Act Amending the Act on Payment Services and Certain Other Acts has been published in the Journal of Laws. The Act adjusts Polish regulations on payment transactions entered into with the use of payment cards to EU provisions (the MIF Regulation). The amendment also 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 Directive). The purpose of the amendments is to facilitate the comparison of fees and services with regard to payment accounts and to regulate the issue of internet services that compare the offers of individual suppliers of financial services.

FINMA publishes circular on direct transmission of non-public information to foreign authorities and entities

The Swiss Financial Market Supervisory Authority (FINMA) has published Circular 2017/6 'Direct transmission' following consultation this summer. The circular outlines the criteria under which institutions supervised by FINMA may directly transmit non-public information to foreign authorities and entities, clarifying the interpretation of Article 42c paragraphs 1 – 4 of the Financial Market Supervision Act (FINMASA).

Article 42c FINMASA applies where information that is not publicly accessible by supervised parties is transmitted from Switzerland to another country, whether the transmission is made spontaneously or in response to a request from a foreign authority or entity. In some circumstances, transmission of information must be reported to FINMA beforehand.

Responses from the consultation showed that supervised institutions had very different views on the legislation's scope of application and conditions for transmission. FINMA has addressed the issues raised in a consultation report, and has amended the circular to include more examples of circumstances where compulsory reporting to FINMA is not required.

The circular comes into force on 1 January 2017 and FINMA will monitor the effectiveness and assess whether further revisions are required.

HKMA issues guidance on empowerment of independent non-executive directors in banking industry

The Hong Kong Monetary Authority (HKMA) has issued a circular to authorised institutions to provide further guidance on the empowerment of independent non-executive directors (INEDs) in the banking industry in Hong Kong.

In July 2015, the HKMA commissioned a small group comprising members with wide-ranging expertise and experience in the area of corporate governance, with particular reference to the banking sector, to undertake a study of the role of INEDs in the local banking sector and to provide their observations and recommendations to help empower INEDs. The group submitted its report to the HKMA in December 2015 and an industry consultation was carried out on the group's recommendations in early 2016.

The guidance is set out in the Annex to the circular, covering the role of INEDs, practices of locally-incorporated authorised institutions with regard to INEDs, and proposed measures to be taken by authorised institutions to ensure that there are sufficient suitably qualified people willing to serve as INEDs on the boards of authorised institutions. The guidance should also be read in conjunction with the HKMA's supervisory policy manual on corporate governance, in particular module CG-1, which follows the guidelines on corporate governance principles for banks published by the Basel Committee on Banking Supervision in July 2015.

The HKMA has advised that authorised institutions should aim to implement the guidance within one year of the date of the circular. In the event of an authorised institution having difficulty in complying with specific requirements, they should contact the HKMA through their usual point of contact to discuss whether any flexibility may be considered.

SFC introduces new measures to heighten senior management accountability

The Securities and Futures Commission (SFC) has issued a circular to all licensed corporations to introduce measures to heighten the accountability of their senior management and to promote awareness of senior management obligations under the current regulatory regime. In particular, the circular is intended to:

- articulate the SFC's view as to who should be regarded as members of senior management of licensed corporations;
- promote awareness of the regulatory obligations and potential liabilities of senior management;
- express the SFC's general expectation that certain members of senior management should seek the SFC's approval to be responsible officers;
- outline certain roles and responsibilities of a licensed corporation's board of directors; and
- provide more guidance as to the information a licensed corporation (or corporate applicant for a licence) should submit in respect of its human resources and organisational structure.

Starting from 18 April 2017, corporate licence applicants and existing licensed corporations will have to submit up-to-date management structure information and organisational charts to the SFC. All existing licensed corporations should submit the required information by 17 July 2017. In addition, their 'managers-in-charge' of the overall management oversight and key business line functions who are not already responsible officers should have applied for approval to become responsible officers by 16 October 2017.

The SFC has also published a set of frequently asked questions (FAQs) to provide more guidance to the industry on the measures. The SFC has indicated that it will organise a series of industry workshops in the first quarter of 2017 to help the industry further understand the measures.

SFC issues circular on algorithmic trading

The SFC has issued a circular to licensed corporations on algorithmic trading. The circular follows a thematic review of selected licensed corporations with a focus on algorithmic trading, conducted by the SFC as part of its continuous effort to supervise and monitor licensed corporations to ensure that their algorithmic trading activities will not pose undue risks to the market. The thematic review was mainly intended to assess whether licensed corporations have put in place appropriate and specific policies, procedures and controls in respect of algorithmic trading to comply with the relevant requirements for management and supervision, system adequacy, and record keeping, as well as the specific requirements for qualification, testing and risk management as stipulated under the Code of Conduct for Persons Licensed by or Registered with the SFC.

While it was generally observed throughout the course of the review that licensed corporations had taken measures to implement frameworks to govern controls surrounding their algorithmic trading systems, there are still areas for improvement to mitigate associated risks. The following areas were noted:

- insufficient representatives from management and control functions providing input to algorithmic governance;
- insufficient pre-trade controls to prevent the generation of algorithmic orders which might adversely affect market integrity;
- inadequate due diligence on algorithmic trading systems provided by third party service providers;
- lack of written contingency plans to cope with potential emergencies specific to algorithmic trading systems; and
- absence of policies and procedures concerning testing requirements for algorithmic trading systems.

The SFC has also issued a set of frequently asked questions (FAQs) to provide further guidance on the relevant requirements in the Code of Conduct and share with the industry a number of sound and effective controls that have been adopted by some licensed corporations. Licensed corporations may consider implementing similar controls and mechanisms, where applicable, to further enhance their algorithmic trading control frameworks.

The SFC has emphasised that the senior management of licensed corporations bears primary responsibility for ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures by their firms in accordance with the Code of Conduct, and should be actively involved in managing and supervising algorithmic trading systems and consider enhancements where applicable.

The SFC will continue to monitor market and regulatory developments in algorithmic trading both in Hong Kong and overseas, and in response may propose further measures.

MAS consults on proposed enhancements to competency requirements for representatives conducting regulated activities

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed enhancements to the competency requirements for representatives conducting regulated activities under the Securities and Futures Act (SFA) and Financial Advisers Act (FAA).

The consultation follows a review by the MAS of the examination framework for appointed representatives, and takes into consideration further changes in the regulatory landscape for the capital markets and financial advisory industries.

Amongst other things, the MAS proposes:

- to enhance the Capital Markets and Financial Advisory Services Examination (CMFAS) by introducing ethics and skills contents into the curriculum;
- to customise the contents of the Rules, Ethics and Skills module to focus on a representative's job role;
- to streamline the securities exchange-related and derivatives exchange-related contents under the CMFAS framework;
- to redesign the product knowledge modules to provide appointed representatives with the option of completing the CMFAS product knowledge examinations in fewer sittings;
- to grandfather all existing appointed representatives and individuals dealing in or advising on over-the-counter derivative contracts from the revised CMFAS when the proposed amendments to the SFA take effect; and
- to align the Continuing Professional Development training requirement for capital markets services appointed representatives with FAA appointed representatives.

Comments on the consultation paper are due by 13 January 2017.

MAS consults on proposed regulations for short selling

The MAS has launched a public consultation on proposed regulations for short selling. The proposed regulations are intended to enhance transparency regarding the level of short selling in securities listed on Singapore's approved exchanges. The detailed short selling reporting requirements are set out in the draft Securities and Futures (Short Selling) Regulations 2017 in Annex B and the draft Guidelines on the Regulation of Short Selling in Annex C of the consultation paper respectively.

The consultation seeks comments on:

- the scope of capital market products that will be subject to short selling reporting requirements, specifically on the proposal to subject both primary listed shares and certain specified secondary listed shares to the short selling reporting requirements as well;
- the proposed requirements to disclose short sell orders;
- the proposed requirements to report short positions, in particular:
  - for reporting responsibility to lie with the immediate legal owner of the short positions (without a look through to immediate or ultimate owners);
  - for designated market makers to be exempted from the requirement to report short positions;
  - whether registered market makers should be required to report short positions or be exempted; and
  - for short positions to be reported two business days after the position day;
- the proposal for institutional entities with multiple trading desks to be given the flexibility to report at trading desk level instead of at entity level, subject to the conditions specified;
- the proposal for investors with multiple fund managers, each with a discretionary mandate, to be given the flexibility to report at fund manager level instead of at entity level, subject to the conditions specified; and
- the proposed timeline for implementation of the regulations.

The MAS intends to publish the finalised regulations four months before the regulations take effect. In addition, the Short Position Reporting System (SPRS) will be made available on the MAS' website in the first quarter of 2017 for voluntary reporting. The MAS encourages market participants to begin registering accounts and using the SPRS on a voluntary basis from the first quarter of 2017 to familiarise themselves with the system, before the reporting requirements come into force.

Comments on the consultation paper are due by 27 January 2017.

Indonesia's financial technology lending industry to be regulated

The Financial Services Authority (OJK) is currently finalising a regulation on lending services based on information technology. Amongst other things, the draft OJK regulation introduces the following key provisions:

- a clear definition of FinTech Lending, i.e. 'provision of financial services which seek to connect a provider of loans with a recipient of loans through a direct loan agreement via electronic systems using an internet network';

- a maximum foreign ownership limit of 85% in FinTech Lending Providers;
- a requirement for a FinTech Lending Provider to register with OJK;
- minimum capital requirements which a FinTech Lending Provider must meet, namely a minimum of IDR 2 billion on registration with OJK and IDR 5 billion when applying for business licences;
- requirements in relation to lending limits, maximum interest (of seven times Bank Indonesia's seven day repo rate per year) and data protection/security;
- financial reporting requirements to safeguard players and consumers;
- a requirement for data centres and disaster recovery centres to be located in Indonesia; and
- a prohibition on Fintech Lenders giving investment advice or recommendations to FinTech Lending Users.

As the regulation is still being finalised, new provisions may still be added and the current provisions modified or removed prior to the regulation coming into force.

Thai Ministry of Finance broadens range of entities that can receive security under Business Collateral Act

The Ministry of Finance has issued a ministerial regulation under the Business Collateral Act (BCA) titled 'The Stipulation of Other Persons as Security Receivers' in order to broaden the range of entities that can take security under the BCA. In addition to financial institutions stipulated under the BCA, the ministerial regulation covers special purpose vehicles (for securitisation), trustees under the law of trust for capital markets transactions, securities companies, mutual funds, debentureholder representatives, derivative companies, asset management companies and factoring companies. However, offshore foreign banks are not permitted to be security receivers under the BCA.

ASIC releases new instrument and guidance on buy-backs for ASX-listed schemes

The Australian Securities Investment Commission (ASIC) has repealed and replaced Class Order [CO 07/422] regarding on-market buy-backs of ASX-listed schemes such as real estate investment trusts (REITs), due to expire on 1 April 2017.

Following a public consultation launched in October 2016, which sought feedback on its proposals to remake CO 07/422 without significant changes and on draft updates to Regulatory Guide 101, ASIC has replaced Class Order [CO 07/422] with a new legislative instrument, ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159.

ASIC has also released an updated Regulatory Guide 101 Managed investment scheme buy-backs which, in addition to ASIC's policy on market buy-backs by ASX-listed schemes, includes guidance on ASIC's broader policy on managed investment scheme buy-backs.

ASIC releases new instrument for nominee and custody services and amends class orders for investor directed portfolio services

Following public consultation, ASIC has repealed and replaced class order [CO 02/295] on nominee and custody services, due to expire on 1 April 2017, with the new legislative instrument ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156.

ASIC has also released an amending instrument 2016/1158 updating two class orders, one for investor directed portfolio services (IDPS) [CO 13/763] and one for IDPS-like schemes [CO 13/762].

ASIC has updated Regulatory Guide 148, Platforms that are managed investment schemes and nominee and custody services, to reflect these changes.

A key issue raised in submissions to the public consultation was the proposed requirement for an operator to ensure that there is a dispute resolution system for underlying issuers or sellers of financial products through the platform. ASIC has dealt with this by:

- amending the relevant provisions to clarify that the dispute resolution requirements only apply where the operator acquires financial products for retail clients; and
- extending the transition period to provide that the dispute resolution requirements apply from 1 January 2018, allowing more time for platform and custody service operators to make relevant system changes.

FRB adopts final rule intended to facilitate orderly resolutions of largest domestic and foreign banks operating in United States

The Federal Reserve Board (FRB) has adopted a final rule affecting the largest domestic and foreign banks operating in the United States. Under the final rule, these institutions will be required to meet a new long-term debt requirement and a new total loss-absorbing capacity (TLAC) requirement. The final rule applies to domestic firms identified by the FRB as global systemically important

banks (GSIBs) and to the US operations of foreign GSIBs. All such firms are required to comply with the rule by 1 January 2019.

The final rule will set a minimum level of long-term debt for domestic GSIBs and the US operations of foreign GSIBs that could be used to recapitalize the critical operations of the firms upon failure. The TLAC requirement will set a new minimum level of total loss-absorbing capacity, which can be met with both regulatory capital and long-term debt. In addition, the final rule will require the parent holding company of a domestic GSIB to avoid entering into certain financial arrangements that would create obstacles to an orderly resolution.

The FRB made the following changes to its related proposed rule in response to comments it had received:

- the final rule will grandfather long-term debt issued on or before 31 December 2016, by allowing it to count toward a firm's long-term debt requirement even if the debt has certain contractual clauses not allowed by the rule;
- while foreign firms' US operations will generally be required to issue long-term debt to their foreign parent, the US operations of certain foreign firms will be permitted to issue long-term debt to external parties, rather than solely to their parent companies, consistent with their resolution strategy; and
- the long-term debt requirements of foreign firms were slightly reduced to be consistent with the treatment of domestic firms.

CLIFFORD CHANCE BRIEFINGS

'Snowball' swaps enforced – again

The English Court of Appeal has confirmed the first instance decision that 'snowball' swaps between Portuguese public transport authorities and a Portuguese bank but governed by English law can be enforced. The transport authorities could not use Portuguese mandatory laws as a justification for non-payment.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2016/12/_snowball_swaps_enforced-again.html

Legal advice privilege – who is the client?

An English judge has put a narrow interpretation on who can be considered to be a lawyer's client for the purposes of legal advice privilege. This will place serious constraints on the extent to which fact gathering for the purposes of providing legal advice can be carried out under the cloak of privilege, and it certainly requires extra care when conducting investigations, unless litigation is imminent.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2016/12/legal_advice_privilegewhoistheclient.html

The Odds Look Good for Integrated Resorts in Japan

Japan has taken a significant step towards making integrated resorts a reality. On 15 December 2016, the Integrated Resort Areas Promotion Act was passed to promote integrated facilities including casinos, hotels, convention centres and other resort and leisure facilities. Japan's casino industry could become Asia's second-largest after Macau, with analysts' estimates of annual turnover ranging from USD 10 billion to USD 15 billion. Discussions over potential sites for Integrated Resorts and the legal and regulatory steps necessary for full implementation will heat up over the next 12 to 18 months.

This briefing paper describes the key features of the Act and discusses opportunities for potential Integrated Resorts in Japan.

https://www.cliffordchance.com/briefings/2016/12/the_odds_look_goodforintegratedresortsinjapan.html